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In The

Supreme Court of the United States

October Term, 1995

MARY McCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,

Petitioner,

vs.

THE CITY OF LYNN,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit erred in creating a new and unprecedented exception to the longstanding and consistent requirement of the Fourth Amendment that, absent exigent circumstances, government agents must obtain a warrant to make a forcible entry into the home of a law-abiding citizen.

LIST OF PARTIES TO THE PROCEEDING

The petitioner is Mary McCabe, as administratrix of the estate of Ruchla "Rose" Zinger. She was the plaintiff in the proceedings in the District Court for the District of Massachusetts and was the appellee before the United States Court of Appeals for the First Circuit.

The respondent is the City of Lynn, Massachusetts, a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts. The respondent was a defendant in the district court proceedings below and was an appellant before the United States Court of Appeals for the First Circuit.

Life-Line Ambulance Service, Inc. was a defendant in the district court proceedings below and was also an appellant before the United States Court of Appeals for the First Circuit, but its appeal was dismissed pursuant to an agreement of voluntary dismissal.

There were a number of other defendants in the district court proceedings below all of whom were dismissed at various points prior to the appeal pursuant to stipulations of dismissal.

The only parties to this action are Mary McCabe, as administratrix of the estate of Ruchla "Rose" Zinger and the City of Lynn, Massachusetts.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 77 F.3d 540 (1st Cir. 1996) and is reprinted in the Appendix at 1a-35a. The decision of the District Court is reported at 875 F. Supp. 53 (D. Mass. 1995) and is reprinted in the Appendix at 36a-57a.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 (1994) is reprinted in full in the Appendix at 58a.

Mass. Gen. L. ch. 123, §§ 1 and 12 (1988) (in effect on September 6th-7th, 1989) are reprinted in full in the Appendix at 59a-63a.

STATEMENT OF THE CASE

A. Facts

On September 6, 1989, a licensed psychiatrist signed an application (known in Massachusetts as a "pink paper") pursuant to Mass. Gen. L. ch. 123 § 12(a), for a 10-day involuntary

commitment of Ruchla "Rose" Zinger, a 64-year-old resident of Lynn, Massachusetts. The pink paper issued was based exclusively on third-party information.

Mrs. Zinger spoke and understood limited English; she suffered from high blood pressure and weighed 350 pounds. In addition to her physical maladies, Mrs. Zinger was a Holocaust survivor and suffered from psychological problems that were, in part, the product of her experiences during World War II.

The next morning, the pink paper was delivered to the Lynn Police Department, and Captain Joseph Csuka instructed Sergeant Richard Donnelly and Officers Gary Twyman and William Alphen (all of the Lynn Police Department) to serve the civil commitment order. Captain Csuka, although in possession of the pink paper throughout the morning, informed Sergeant Donnelly that the commitment would be carried out at 1:00 p.m. Captain Csuka advised Sergeant Donnelly that Mrs. Zinger would not cooperate with them and they would have to force their way into her house.

In addition to the involuntary commitment, an action had been brought against Mrs. Zinger resulting in an eviction order. Captain Csuka ordered the civil commitment to be carried out at 1:00 p.m. to accommodate a State Constable who would secure the premises following the eviction.

At the scene, the constable informed the officers that based on his prior attempts to serve eviction notices, he believed Mrs. Zinger would not answer the door. He directed them to go to the rear door for the easiest point of entry into the home. The officers knocked on the door and rang the doorbell. Mrs. Zinger did not answer. After approximately one minute, Sergeant Donnelly ordered Officer Alphen to kick down the door.

Once through the door, all three officers and the constable proceeded up the stairs to a second door, which was also locked. Officer Alphen knocked on the door and said "Hello, Police." When no one answered, Sergeant Donnelly ordered Officer Alphen to kick this door down. After Officer Alphen kicked through one panel, Mrs. Zinger came to the door and opened it slightly. Sergeant Donnelly showed Mrs. Zinger the commitment order and told her that she needed to see a doctor. Mrs. Zinger yelled "why, why, no doctors" and started to close the door. Sergeant Donnelly forced his foot between the door jam and the door preventing it from closing all the way. At this point, the officers pushed their way into Mrs. Zinger's home and forced her to the floor, face down.

With Mrs. Zinger forced into a prone position, all three officers handcuffed the 64-year-old woman behind her back while she struggled and screamed. During the process, Mrs. Zinger was so distraught she urinated on herself and on one of the officers who was sitting on her to hold her down.

Shortly after arriving at the scene, the officers called Life-Line Ambulance to transport Mrs. Zinger to a mental health facility because they believed she was too big to transport in the cruiser. When the ambulance crew arrived, they informed the officers that due to Mrs. Zinger's weight, they could not carry her down the stairs on a stretcher. Upon hearing this, the officers dragged Mrs. Zinger down the stairs on her buttocks.

After bringing Mrs. Zinger to the bottom of the stairs, the officers forced her face down on a stretcher, where she was strapped in, still handcuffed behind her back. At this time, she stopped moving, and one of the officers noticed that she was blue and that blood was coming down the side of her mouth. Rose Zinger was pronounced dead at 2:00 p.m.

B. Decisions Below

The administratrix of Mrs. Zinger's estate, Mary McCabe, brought suit against the City of Lynn, among others, under 42 U.S.C. § 1983, alleging that the City's policy permitting police officers to execute pink papers by means of forcible, warrantless entries into private residences, absent exigent circumstances, violated Mrs. Zinger's Fourth Amendment right to be free from unreasonable searches and seizures.

The district court granted the administratrix's cross-motion for summary judgment against the City on the issue of liability, 875 F. Supp. 53, 63 (D. Mass. 1995). The district court found that the City's policy, which did not require police officers to obtain a warrant before effecting an entry of a private residence to execute a pink paper, violated the Fourth Amendment. *Id.* at 58. Noting the significant delay between the time the pink paper was signed on September 6, 1989 and the time it was executed on the afternoon of September 7, 1989, the district court specifically found on undisputed evidence that no exigent circumstances were present in this case. *Id.* at 58-59. At trial, a jury awarded Mrs. Zinger's estate $850,000.00 in damages against the City and $500,000.00 against Life-Line Ambulance.

The City appealed, and the Court of Appeals for the First Circuit reversed, 77 F.3d 540 (1st Cir. 1996). The circuit court ruled that the City's policy of warrantless home entries for the purpose of serving involuntary hospitalization orders in civil commitment proceedings fell within a recognized class of systemic "special need" searches that may be conducted without warrants if they further important administrative purposes. *Id.* at 546. Balancing the nature and quality of the intrusion on an individual's Fourth Amendment interests against the importance of the governmental interests at issues, the Court of Appeals concluded that the City's policy of permitting, forcible

warrantless entries by police officers in possession of civil commitment orders was reasonable under the Fourth Amendment. *Id.* at 547.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case concerns an issue that goes to the very heart of the protection secured by the Fourth Amendment. As this Court recognized in *United States v. United States District Court*, 407 U.S. 297, 313 (1972), "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Indeed, this Court has "emphasized that 'at the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Accordingly, this Court has recognized that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980). This Court should grant Certiorari because the decision below crosses that "firm line."

Prior to the decision below, the law was clear that, absent exigent circumstances, government agents are required to obtain a warrant before making a forcible entry into the home of a law-abiding citizen. In manufacturing a new exception to this longstanding requirement, the First Circuit relied on two inapplicable strands of doctrine — one that allows warrantless entries into the homes of *probationers*, *see Griffin v. Wisconsin*, 483 U.S. 868 (1987); and another that permits warrantless

searches of some areas, *but not homes*, in certain administrative contexts, *see e.g.*, *New York v. Burger*, 482 U.S. 691 (1987) (warrantless search of automobile junkyard); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (warrantless search of public employee's desk).

Reliance on either of these strands of doctrine is wholly inappropriate. The rights of probationers (or parolees) are not coextensive with those of law-abiding citizens. Indeed, the entire predicate of the *Griffin* decision was that "[p]robation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty," and that therefore the Constitution "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." 483 U.S. at 874, 875 (internal quotations omitted). The First Circuit's reliance on decisions from an administrative context is likewise unjustified, because this Court has unequivocally held that, even in an administrative context, a warrant *is* required to make a forcible entry into a home. *See Camara v. Municipal Court*, 387 U.S. 523, 540 (1967).

I.

THIS CASE RAISES AN ISSUE OF GREAT IMPORTANCE.

This case squarely raises an issue of great importance in Fourth Amendment jurisprudence — whether police officers must, *absent exigent circumstances*, obtain a warrant to enter a private residence to execute a civil commitment order. The decision below, which carves out a novel and unprecedented "special needs" exception to the warrant requirement, is a significant departure from this Court's settled understanding of Fourth Amendment law and will have a significant impact on the

hundreds of thousands of civil commitment proceedings instituted in the United States each year.

The decision of the First Circuit, for the first time in the history of American jurisprudence, authorizes the police, acting without a warrant, to break down the doors of citizens who have not committed — or even been alleged to have committed — any crime. The sole prerequisite for this violation of the privacy and sanctity of the home is the certificate of a doctor, psychologist or psychiatric nurse that attests that an individual presents a substantial risk of dangerousness due to mental illness. Under the Court of Appeals' decision, this determination of dangerousness need not be based upon probable cause, because such a requirement would unduly burden the state in its systemic response to the problem of dangerousness in the mentally ill. 77 F.3d at 550-551, 550 n.11.

Under the decision of the First Circuit, the sole role of the judiciary in reviewing the lawfulness of a forcible entry into a citizen's home is to determine whether the entry was authorized as part of a reasonable State program, as embodied in the State's civil commitment statute. Under the First Circuit's interpretation of the Fourth Amendment, if those statutes are reasonably related to legitimate State interests, then the policy of forcible entry is lawful. 77 F.3d at 550.

Twenty-six states besides Massachusetts have commitment statutes that authorize an emergency seizure of an individual if a mental health professional (not even necessarily a doctor) certifies that the individual is dangerous to himself or to others due to mental illness.[1] The decision below could permit police to

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1. The state statutes included in the Appendix at 67a-68a allow emergency seizures of an individual based upon certification of an official (Cont'd)

execute a civil commitment order by a forcible home invasion in each of those jurisdictions. The most recent statistics compiled by the National Institute of Mental Health show that approximately 300,000 involuntary commitment proceedings are instituted annually.[2] Other empirical studies show that civil commitment proceedings overwhelmingly affect a population that is not only economically disadvantaged, but also mentally disabled.[3] As a result of these factors, the vast majority of the execution of such orders will not receive judicial scrutiny. This case therefore presents this Court with a unique opportunity to address this fundamental issue of Fourth Amendment law that has practical consequences for thousands of disadvantaged Americans in dozens of jurisdictions.

(Cont'd)
trained in the field of mental health. There is variety among the statutes concerning such issues as: (1) whether the risk of dangerousness is required to be imminent; (2) whether an examination is required prior to certification; (3) considerations relating to recency of examination and/or promptness of service of the commitment order; and (4) the identity and qualifications of the persons authorized to certify the need for a seizure. But under the First Circuit's permissive approach, orders issued under any of the statutes would authorize warrantless home entries.

2. *See*, Marilyn Rosenstein, *et al., U.S. Dept. of Health and Human Serv., Mental Health Statistical Note No. 178, Legal Status of Admission to Three Inpatient Psychiatric Settings 1-4 (1986)*, cited in John Q. LaFond and Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 Vill. L. Rev. 71, 105 n.176 (1994).

3. *See*, Virginia A. Hiday, *Civil Commitment: A Review of Empirical Research*, 6 Behav. Sci. & L. 15, 19 (1988); LaFond and Durham, *supra*, at 105-106.

II.

THE DECISION BELOW IS AN UNJUSTIFIED DEVIATION FROM CONSISTENT PRECEDENT.

The First Circuit erred in relying on administrative search cases such as *O'Connor v. Ortega*, 480 U.S. 709 (1987), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), to justify its creation of a new "special needs" exception to the warrant requirement for home entries. Both *O'Connor* and *T.L.O.* involved expectations of privacy and personal security far removed from those at stake in forcible home entries — *i.e.*, the expectation of privacy a government worker has in his office desk, (*O'Connor*), and that of a student in her pocketbook on school premises, (*T.L.O.*). Both decisions are expressly premised upon the limited nature of the expectation of privacy outside the home. As this Court stated in the *O'Connor* case: "Public employees' expectations of privacy in their office, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor*, 480 U.S. at 717. The lower expectations of privacy in a school or workplace setting cannot compare to the near absolute expectation of privacy present in a home setting.

The First Circuit's reliance on *Wyman v. James*, 400 U.S. 309 (1971), is also inapposite as justification for a policy of forcible entry to the home. This Court in *Wyman* held that a welfare visit does not rise to the level of an intrusion subject to Fourth Amendment protection, because there is no compelled home entry: "We note, too, that the visitation itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id.* at 317. Thus, *O'Connor*, *T.LO*, *Wyman*, and

Camara all respect the "firm line" established in *Payton*: While a number of different factors are considered in cases involving searches outside a home *(O'Connor, TLO)*, the threshold of a home cannot be crossed without consent (*Wyman*) or a warrant (*Camara*).

The First Circuit's reliance on *Griffin v. Wisconsin, supra*, is likewise misplaced. The result in *Griffin* was expressly predicated on the fact that those convicted of criminal acts may be subjected to greater invasions of their privacy than to the public at large. *Griffin*, 483 U.S. at 874, 875. The privacy expectations of law-abiding citizens cannot be equated with those of convicted criminals.

In short, the decision below fails to recognize this Court's consistent fundamental precedents that accord the highest level of protection to the expectation of privacy in the home. Due to the unique protection afforded to the home, neither the *Griffin* decision nor cases involving searches outside the home are applicable. Instead, in the context of administrative searches this case is squarely governed by the *Camara* case, which expressly held that a warrant is required to compel entry to the home. *Camara*, 387 U.S. at 540.

III.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

In holding that the City's policy of permitting forcible, warrantless, entries into private residences to execute civil commitment orders is not unreasonable, the Court of Appeals rejected any need for a showing of probable cause before such orders are issued. "It is largely irrelevant whether the 'likelihood

of serious harm' criterion in Mass. Gen. Laws Ann. ch. 123, § 12(a), approximates the 'probable cause' inquiry appropriate in the search warrant context. The 'probable cause' inquiry often is jettisoned in civil administrative searches[.]" 77 F.3d at 550 n.11 (citing *O'Connor* and *T.L.O.* for the proposition that probable cause is not mandated). In place of the well-settled probable cause standard, the First Circuit ruled that involuntary commitment orders need only meet a standard of reasonableness. 77 F.3d at 551.

That holding stands in stark contrast to the rulings of every federal appellate court that has considered the question. Each of the following cases holds that an order authorizing the seizure of a person in the context of civil commitment proceedings must be based on probable cause: *Pino v. Higgs*, 75 F.3d 1461, 1468 (10th Cir. 1996); *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993); *Villinova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992); *Gooden v. Howard County, Md.*, 954 F.2d 960, 967-968 (4th Cir. 1992) (*en banc*); *Maag v. Wessler*, 960 F.2d 773, 775-776 (9th Cir. 1991); *Harris v. Pirch*, 677 F.2d 681, 686 (8th Cir. 1982); *In re Barnard*, 455 F.2d 1370, 1374 (D.C. Cir. 1971). The reasoning underlying these decisions is exemplified in the *Pino* case. There, the Tenth Circuit reasoned that because "a seizure of a person for an emergency mental health evaluation raises concerns that are closely analogous to those implicated by a criminal arrest, and both are equally intrusive," the probable cause standard must be applied to the issuance of an order authorizing seizure pursuant to a civil commitment statute. *Pino*, 75 F.3d at 1467-1468. It is important for this Court to grant certiorari to eliminate the conflict engendered by the decision below and to affirm that probable cause is required for the issuance of a civil commitment order.

IV.

THE REASONS FOR GRANTING CERTIORARI ARE EQUALLY OR MORE COMPELLING IN THIS CASE THAN IN *SOLDAL v. COOK COUNTY.*

The case for granting certiorari is at least as compelling in this case as it was in *Soldal v. Cook County*, 506 U.S. 56 (1992). Like this case, that case involved a 42 U.S.C. § 1983 claim that government agents violated the Fourth Amendment in a civil context. Like this case, *Soldal* squarely concerned a core protection of the Fourth Amendment — protection of the home. Like this case, the Court of Appeals below had created a new exception to that core protection. This Court granted certiorari in *Soldal* and reversed unanimously. It should do the same here.

In *Soldal*, the petitioners sought review on the issue of whether the seizure and removal of their trailer home constituted a "seizure" within the meaning of the Fourth Amendment. 506 U.S. at 60. Even the Court of Appeals below in that case recognized the issue to be a "novelty," *Soldal v. County of Cook*, 942 F.2d 1073, 1075 (7th Cir. 1991). There was no circuit split in that case and there was no indication that the unusual fact pattern (literal seizure of a home) was likely to recur with any frequency. Nonetheless, this Court granted certiorari and reversed with a strong reaffirmation of the principle that "at the very core of the Fourth Amendment stands the right of a man to be free from unreasonable governmental intrusion." 506 U.S. at 61 (internal quotations omitted).

The issue presented in this case is at least as important as that in *Soldal*. Unlike the "novel[ ]" fact pattern in that case, hundreds of thousands of involuntary civil commitment proceedings are instituted each year in this country. Prior to the

First Circuit decision, orders of civil commitment would not have authorized forcible, warrantless entries into homes. But under the First Circuit's approach, thousands of those orders will now allow circumvention of what *Payton* termed the "firm line" in Fourth Amendment law, that, "[a]bsent exigent circumstances, th[e] threshold [of a home] may not reasonably be crossed without a warrant." 445 U.S. at 590.

Indeed, the decision below departs from established precedent far more than the lower court decision did in *Soldal*. Even the Court of Appeals in *Soldal*, while attempting to adopt a "narrow reading of the [Fourth] Amendment" (506 U.S. at 62), nonetheless acknowledged that, even in the civil context, police officers could not invade the "privacy of the home." 942 F.2d at 1076. In particular, that Court of Appeals cited with favor (*see* 942 F.2d at 1076) the Tenth Circuit decision in *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987), *remanded on unrelated grounds*, 853 F.2d 805 (10th Cir. 1988) (*en banc*), which held that agents could not make a warrantless entry into a home to execute a court order of possession against certain personal property. The decision of the First Circuit allows a whole new category of invasions to the privacy of the home in a civil context and also conflicts with *Specht*.

Specht cannot be reconciled with the decision below unless the Fourth Amendment provides *less* security to people than to things. At least in *Specht*, the officers making the warrantless entry into a home had an order issued *by a court*. Still, the *Specht* court held that the warrantless entry into the home in an attempt to execute the order of possession against certain personal property was unconstitutional because it did not fit into any recognized exception to the Fourth Amendment warrant requirement. *See* 832 F.2d at 1522-23. In this case, the officers who kicked in the doors of Mrs. Zinger's home did not have any court order, but only a "pink paper," which, according to the First

Circuit, can be issued without probable cause by any physician, psychologist, or psychiatric nurse.

Finally, the interests at stake in this case are at least as great as those threatened in *Soldal*. The decision below, like that in *Soldal*, is a direct threat to "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origin of the Republic." *Payton*, 445 U.S. at 601; *see also Soldal*, 506 U.S. at 61 (collecting cases on protection of the home). Here, it is undisputed that Mrs. Zinger's home was violently entered. Although the constitutional violation in *Soldal* was very serious, at least the unconstitutional actions of the officers there did not actually invade the home.

As evidenced by the decision to grant certiorari and the unanimous reversal in *Soldal*, this Court has historically protected the sanctity of the home with vigor. This case warrants adherence to that tradition.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT AND MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 29, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1731

MARY MCCABE, ETC.,
Plaintiff, Appellee,

v.

LIFE-LINE AMBULANCE SERVICE, INC.,
Defendants-Appellees,

THE CITY OF LYNN,
Defendant, Appellant.

JUDGMENT

Entered: February 29, 1996

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court judgment is reversed and the case is remanded to the district court for further proceedings consistent with the opinion issued this date.

Costs to appellant.

By The Court:
WILLIAM H. NG, Clerk.

By s/ Mary E. C'Callaghan
Deputy Clerk

Appendix A

United States Court of Appeals
For the First Circuit

No. 95-1731

MARY McCABE, ETC.,

Plaintiff, Appellee,

v.

LIFE-LINE AMBULANCE SERVICE, INC.,

Defendants, Appellees,

THE CITY OF LYNN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nancy Gertner, *U.S. District Judge*]

Cyr, Boudin and Stahl,
Circuit Judges.

Charles M. Burnim, with whom *Michael J. Barry* and *George S. Markopoulos* were on brief for appellant.

Charles M. Campo, Jr., with whom *Floyd H. Anderson* and *Kassler & Feuer, P.C.* were on brief for appellee McCabe.

Appendix A

February 29, 1996

CYR, *Circuit Judge.* In this appeal by the City of Lynn ("City"), we consider whether an established City policy, permitting forcible, warrantless entries of private residences to enforce involuntary civil commitment orders, violates the Fourth Amendment to the United States Constitution. The district court granted summary judgment for plaintiff Mary McCabe, administratrix of the estate of Ruchla Zinger, a Holocaust survivor who died in her Lynn home during a tragic attempt by City police to execute an involuntary commitment order which had been issued against her. For the reasons discussed in this opinion, we conclude that the challenged City policy came within an exception to the Fourth Amendment warrant requirement.

I

BACKGROUND

Ms. Zinger, a 64-year-old Lynn, Massachusetts, resident with a history of mental illness and psychiatric hospitalization, as well as severe obesity and high blood pressure, resisted all attempts at communication and intervention by family members. She refused to be examined by a doctor after threatening her former husband with physical harm and upsetting her downstairs neighbors by causing loud and violent disturbances in her apartment, thereby prompting her family to initiate eviction proceedings against her.[1] Subsequently, on September 6, 1989, a licensed psychiatrist, Dr. Yakov Barden, signed an application

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1. Ms. Zinger's former husband and their children owned the building in which Ms. Zinger's apartment was located.

[hereinafter: "pink paper"] for a ten-day involuntary commitment of Ms. Zinger pursuant to Mass. Gen. Laws Ann. ch. 123, § 12(a), based exclusively on the reports of family members and neighbors as to Ms. Zinger's physical and behavioral symptoms.

The next morning, Constable Kenneth Jackson, who had been unsuccessful in previous attempts to serve Ms. Zinger with an eviction notice, and was scheduled to execute a judgment of eviction against her at 1:00 p.m. that afternoon, learned that the pink paper had been issued against Ms. Zinger the night before, and contacted the Lynn police department. The constable informed the Lynn police, based on his experience with Ms. Zinger, that he believed she would resist committal. The constable and the Lynn police officers arranged to meet at the Zinger apartment building at 1:00 p.m., to execute the pink paper and the eviction order.

Three Lynn police officers and the constable arrived at the Zinger apartment building at the appointed hour, accompanied by a crew from the Life-Line Ambulance Service, which had been engaged to restrain Ms. Zinger as necessary, physically remove her from the apartment, and transport her to the hospital. After receiving no response to their knocks, the officers kicked in the outside apartment-house door and proceeded upstairs to the Zinger apartment. The officers knocked and announced their presence, received no response, and began to kick in the Zinger apartment door. Ms. Zinger began screaming "Why are you kicking in my door?" then cracked it open. Identifying themselves as police, the officers told her that they were going to bring her under medical care, to which she responded: "No doctors!" When she began to close the door, the officers shoved their way inside. Later, while the officers were forcibly

removing her from the apartment, Ms. Zinger suffered a cardio-respiratory arrest and died.[2]

After McCabe, as administratrix, instituted this civil rights action under 42 U.S.C. § 1983 against the City, amongst others,[3]

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2. The only constitutional violation McCabe attributes to the City is the forcible warrantless entry. In her cross-motion for summary judgment, McCabe did not press her "excessive force" claim that a City policy authorized or caused the police actions utilized to restrain Ms. Zinger. *See infra* note 4. We now summarize the allegations against the individual officers in order to provide additional context.

After the officers pushed their way into her apartment and Ms. Zinger began screaming, the officers forced her to the floor on her stomach and handcuffed her hands behind her back. She lost control of her bladder. The ambulance crew refused to carry her down the stairs, asserting that she was too heavy. The officers then placed her in a sitting position. With one officer gripping her ankles and another holding her under her handcuffed arms, she was carried to the stairs, then dragged down one step at a time while still in a sitting position. At the bottom, the ambulance crew strapped her onto the stretcher, face down. By this time she had stopped screaming and the officers noticed that her hands appeared blue and she was bleeding from her mouth. Ms. Zinger was pronounced dead on arrival at the hospital.

3. The judgment appealed from is nonetheless "final" as to all parties and claims. *See* Fed. R. Civ. P. 54(b); 28 U.S.C. § 1291. The original ten-count complaint named as defendants, the City, the dispatching police supervisor and the three individual police officers who executed the pink paper (in their official and individual capacities), the constable, the ambulance company, the ambulance crew, Dr. Barden, and the Tri-City Mental Health and Retardation Center where Dr. Barden worked. In addition to her claims under § 1983, McCabe alleged common-law assault and battery, and negligence. In June 1993, McCabe settled all claims against the doctor and the hospital. In February 1995, after a jury returned verdicts against the City and Life-Line Ambulance, the claims against the four police officers, the constable, and the ambulance crew were dismissed, without prejudice, by stipulation.

in September 1992, an amended complaint alleged an established City policy permitting police officers to execute pink papers by means of forcible, warrantless entries into private residences absent demonstrable exigent circumstances, and that this City policy proximately caused an actionable deprivation of Ms. Zinger's Fourth Amendment right to be free from unreasonable searches.[4] After hearing, the district court granted the McCabe cross-motion for summary judgment against the City on the issue of liability. *McCabe v. City of Lynn*, 875 F. Supp. 53, 63 (D. Mass. 1995). In the ensuing trial, the jury awarded $850,000 in damages against the City and $500,000 against Life-Line Ambulance. The City thereupon brought this appeal from the final judgment entered against it.

II

DISCUSSION

A. *District Court Opinion*

The district court found that the City policy violated the Fourth Amendment, for the following reasons. The City's own policy expert attested that the City did not require its officers to obtain a search warrant before effecting a warrantless entry of a residence to execute a pink paper, leaving it instead to the discretion of the officers whether and when such a warrantless entry was necessary. *Id.* at 58. The district court noted that warrantless, nonconsensual entries into private residences are presumptively "unreasonable" under the Fourth Amendment, absent exigent circumstances. *Id.* at 58-59. Although imminent threats to the lives and safety of the police officers, or members

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4. By contrast, the initial complaint had alleged a City policy permitting the use of excessive force, and a failure to train or supervise officers, in executing involuntary commitment seizures.

of the public, often give rise to exigent circumstances justifying an immediate warrantless entry, the court found that "the Lynn police acted with *leisure* in arranging a convenient time" to serve the pink paper upon Ms. Zinger, thereby belying any contention that " 'some real[,] immediate or serious consequences [would occur] if [the officers] postponed action to get a warrant.' " *Id.* at 59, 62 (citation omitted).

The district court nonetheless recognized that even absent exigent circumstances the warrant requirement may not be applicable in certain regulatory contexts wherein warrantless search procedures serve as invaluable "administrative tool[s]" and are "far less invasive" than searches directed at discovering evidence of crime. *Id.* at 59-60. The court identified two factors which weighed against a ruling that the challenged City policy came within this special regulatory category. First, unlike a judicial officer, the licensed medical-psychiatric physicians authorized to issue pink papers under Mass. Gen. Laws Ann. ch. 123, § 12(a), are "not qualified to determine whether probable cause exists." *Id.* at 61. Second, "the agents of the doctors in this case are police officers with guns and batons, not hospital orderlies and nurses," so that "[t]here is no therapeutic relationship which a warrant mechanism would disrupt." *Id.*

B. ***Standard of Review***

We review a grant of summary judgment *de novo,* to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Velez-Gomez v. SMA Life Assurance Co.,* 8 F.3d 873, 874-75 (1st Cir. 1993). All competent evidence and reasonable inferences therefrom are

viewed in the light most favorable to the party resisting summary judgment. *Id.*

C. *Applicable Law*

A municipal liability claim under § 1983 requires proof that the municipality maintained a policy or custom which caused, or was the moving force behind, a deprivation of constitutional rights. *See, e.g., Oklahoma City v. Tuttle,* 471 U.S. 808, 819 (1985); *Monell v. Department of Social Servs.,* 436 U.S. 658, 694 (1978); *Bordanaro v. McLeod,* 871 F.2d 1151, 1156 (1st Cir.), *cert. denied,* 493 U.S. 820 (1989).

The Fourth Amendment applies not only to governmental searches and seizures in criminal investigations, but also in various *civil* proceedings. *See Soldal v. Cook County, Ill.,* 506 U.S. 56, __, 113 S. Ct. 538, 548 (1992); *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987) ("[B]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' . . . it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' ") (quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 335 (1985)). Included among the civil proceedings in which the Fourth Amendment applies are involuntary commitment proceedings for dangerous persons suffering from mental illness. *See Glass v. Mayas,* 984 F.2d 55, 58 (2d Cir. 1993); *Villanova v. Abrams,* 972 F.2d 792, 795-96 (7th Cir. 1992).

The fundamental inquiry under the Fourth Amendment is whether a particular search or search procedure is "reasonable" in the circumstances. *See Cady v. Dombrowski,* 413 U.S. 433,

439-40 (1973); *Wyman v. James*, 400 U.S. 309, 318 (1971); *Camara v. Municipal Ct. of San Francisco*, 387 U.S. 523, 538 (1967). Nonconsensual entries by government agents into a residence without a search or arrest warrant[5] are presumptively "unreasonable" under the Fourth Amendment. *See Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir.), *cert. denied*, 116 S. Ct. 675 (1995). This presumption is designed to safeguard the special privacy expectations traditionally recognized in the American home by requiring that a "neutral" and detached judicial officer make an independent assessment as to whether law enforcement agents have probable cause to effect an intended search or arrest within the home. *See Steagald v. United States*, 451 U.S. 204, 212 (1981). The warrant requirement is not absolute, of course, and the presumption may be overcome in at least two ways.

First, a warrantless entry and search of a residence may be "reasonable," in Fourth Amendment terms, if the government can demonstrate certain exceptional types of exigent circumstances: (1) "hot pursuit" of a felon into a residence; (2) imminent destruction of evidence within the residence; (3) a threatened and potentially successful escape by a suspect from inside the residence; or (4) an imminent threat to the life or safety of members of the public, the police officers, or a person located within the residence. *See United States v. Tibolt*, 72 F.3d 965, __ (1st Cir. 1995) [Nos. 94-1714 & 2221, 1995 WL 757848, at *3

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5. "[A] [felony] arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). *But see Steagald v. United States*, 451 U.S. 204, 214 (1981) (noting that the "arrest warrant" rule is inapplicable where suspect is within another person's residence).

(Dec. 29, 1995)]; *Hegarty*, 53 F.3d at 1374. Normally, "exigent circumstances" exceptions — by their very nature — turn upon the objective reasonableness of *ad hoc*, fact-specific assessments contemporaneously made by government agents in light of the developing circumstances at the scene of the search. *See id.* at 1378.

Second, a residential search pursuant to an established warrantless search *procedure* may be reasonable if conducted in furtherance of an important administrative or regulatory purpose, or "special need," which would be undermined *systemically* by an impracticable warrant or probable-cause requirement. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'") (citation omitted). *See, e.g., id.* (upholding probation officers' prerogative to conduct warrantless searches of probationers' homes for evidence of probation infraction); *O'Connor*, 480 U.S. at 709 (noting that government employer's warrantless searches of employees' work space to recover work-related materials may be "reasonable" in particular circumstances); *T.L.O.*, 469 U.S. at 325 (holding that warrantless in-school searches of students' personal property by public school officials did not violate Fourth Amendment); *United States v. Cardona*, 903 F.2d 60 (1st Cir. 1990) (extending *Griffin* to parole officers' warrantless searches of parolees' residences), *cert. denied*, 498 U.S. 1049 (1991); *cf. Wyman*, 400 U.S. at 309 (holding that social worker's warrantless visitation to welfare recipient's home did not implicate Fourth Amendment). The reasonableness of a particular "special need" search procedure will depend, of course, on whether the court's "careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard that stops short of probable cause." *T.L.O.*, 469 U.S. at 341.

Appendix A

D. *Alleged "Deprivation"*

Turning to the initial hurdle confronting McCabe under § 1983, *see Monell*, 436 U.S. at 694, we must determine whether the undisputed evidence demonstrates that the warrantless, forcible entry of the Zinger residence by the Lynn police constituted a deprivation of decedent's Fourth Amendment rights. Oddly, none of the cases the City cites as support for the constitutionality of comparable involuntary commitment statutes deals straightforwardly with the precise issue before us: whether a prescribed statutory search procedure (i.e., Mass. Gen. Laws Ann. ch. 123, § 12(a)) violates the Fourth Amendment because it routinely allows warrantless entries of a residence, absent "exigent circumstances," to effect involuntary commitments; nor have we found such a case. The cases cited by the City consider whether a seizure of the *person* effected pursuant to an involuntary commitment statute violates the *due process* requirements of the Fifth and Fourteenth Amendments,[6] or whether the manner in which the government detains a person violates the Fourth Amendment prohibition against unreasonable seizures.[7] Nonetheless, to the extent the

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6. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 963 (2d Cir. 1983) (involving a Fourteenth Amendment "due process" challenge to the New York involuntary commitment statute).

7. *See Moore v. Wyoming Medical Ctr.*, 825 F. Supp. 1531, 1535, 1537 (D. Wyo. 1993) (focusing on "seizure" of person subjected to involuntary commitment, and noting only in passing that seizure followed a forcible warrantless entry of the home); *see also Glass*, 984 F.2d at 58 (holding that the committing physicians were entitled to qualified immunity for ordering "seizure" because they reasonably believed that subject was mentally ill and "dangerous"); *Villanova*, 972 F.2d at 797 (discussing Fourth Amendment and due process implications arising from prolongation of involuntary commitment, or seizure of the person, without independent judicial

(Cont'd)

technically inapposite "seizure" cases relied on by the City might be considered appropriate analogs in this unchartered area, we consult their reasoning for guidance.

Although the parties devote considerable attention to whether there remains a genuine factual dispute regarding the substance of the challenged City "policy," we consider its essential features clear enough; that is, the policy permits warrantless residential searches, without requiring "exigent circumstances," in order to effect an involuntary commitment pursuant to a properly issued pink paper. Of course, the City argues that every entry is *per se* "exigent" since a pink paper can only issue upon an expert medical finding that the subject presently poses a "likelihood of serious harm" to herself or others, which in turn provides the police with reasonable cause to believe that an immediate, forcible entry for the purpose of

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(Cont'd)

determination of probable cause, where commitment occurred while person was in *jail*).

Moreover, the absence of any authority for the McCabe contention — that the warrantless "forcible entry" phase of an involuntary commitment should be treated differently than the committal "seizure" itself — arguably indicates that a constitutional foundation is lacking. *See Cardona*, 903 F.2d at 64 (rejecting similar attempt to draw "entirely artificial distinction[s] between 'search' jurisprudence and 'seizure' jurisprudence"). And since the cases cited by the City overwhelmingly hold that warrantless, involuntary commitment seizures generally comport with the strictures of the Fourth Amendment, *see Villanova*, 972 F.2d at 795 ("There is no requirement of a warrant issued by a judicial officer [to seize the person subject to a commitment order]."), thus constituting a valid pink paper the practical equivalent of an arrest warrant, *see supra* note 5; *cf. Welsh*, 466 U.S. at 748-49; *Payton*, 445 U.S. at 586; *Hegarty*, 53 F.3d at 1373, a separate requirement that a search warrant be obtained before entering the residence to seize the subject could be viewed as supererogatory.

detaining the resistant subject is necessary to avert the "serious harm's identified in the pink paper.

On the other hand, McCabe contends that these remote medical-psychiatric "emergency" determinations do not equate with constitutionally cognizable "exigent circumstances," because they do not turn on the executing officer's fact-specific, on-the-scene assessment as to the immediacy of any putative threat the subject may pose to herself or others. McCabe stresses that during the several hours which were allowed to elapse before the pink paper was executed upon Ms. Zinger, the officers would have had ample time to obtain a search warrant. And McCabe points out that none of the four recognized "exigent circumstances," *see supra* p. 10, was plainly present immediately before the forcible police entry.

As these claims reflect the legal gloss placed on the record evidence, rather than a genuine factual dispute concerning the substance of the City policy, we need not enter the skirmish over the distinctions between "emergencies" and "exigent circumstances." The City policy, as evidenced by the actual conduct of its police officers,[8] falls squarely within a recognized class of *systemic* "special need" searches which are conducted without warrants in furtherance of important administrative purposes. Again, the fundamental concern of Fourth

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8. Contrary to McCabe's contention, we need not decide whether the City waived the argument that its police officers' actions were not undertaken pursuant to City policy, and that it is therefore not liable under *Monell*, 436 U.S. at 694. The City merely argues that the actual police conduct in effecting a warrantless entry often provides the best circumstantial evidence as to the nature of the challenged municipal policy. *See Bordanaro*, 871 F.2d at 115657 (observing that the event itself is evidence that police officers acted in accordance with municipal policy).

Amendment jurisprudence in general, and in "special need" search cases as well, is whether an established search procedure is "reasonable" in light of the actual circumstances in the particular case. *See Cady*, 413 U.S. at 439-40; *see also O'Connor*, 480 U.S. at 719; *T.L.O.*, 469 U.S. at 337. "Reasonableness," in turn, depends on " 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *O'Connor*, 480 U.S. at 719 (citation omitted); *see T.L.O.*, 469 U.S. at 341; *Cardona*, 903 F.2d at 67; *cf. Villanova*, 972 F.2d at 796. On balance, we find that the City policy permitting forcible, warrantless entries by police officers in possession of a pink paper properly issued pursuant to Mass. Gen. Laws Ann. ch. 123, § 12(a), is reasonable under the Fourth Amendment.

1. *State's "Administrative" Interest*

(a) *Parens Patriae and Police Power*

The legitimacy of the State's *parens patriae* and "police power" interests in ensuring that "dangerous" mentally ill persons not harm themselves or others is beyond dispute. *See Rogers v. Okin*, 634 F.2d 650, 654 (1st Cir. 1980), *rev'd on other grounds*, 457 U.S. 291 (1982); *Thompson v. Commonwealth*, 438 N.E.2d 33, 36 (Mass. 1982). The potential consequences attending a delayed commitment both to the mentally ill subject and others — may be extremely serious, sometimes including death or bodily injury. Thus, we think it is especially significant to the present analysis that warrantless "special need" searches have been condoned by the courts in circumstances where the State interests were far less compelling and urgent. *Cf., e.g., O'Connor*, 480 U.S. at 724 (noting: because "public employees

are entrusted with tremendous responsibility," "the consequences of their misconduct or incompetence to both the agency and the public interest can be severe"); *New York v. Burger*, 482 U.S. 702, 708-09 (1987) (noting: where "the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable[,]" and that "the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry"); *T.L.O.*, 469 U.S. at 339 ("Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.").

We therefore inquire whether these residential search procedures are appropriately tailored to the legitimate and important interests at stake; in other words, whether the procedures are reasonably designed to ensure accurate identification and prompt detention of recalcitrant and "dangerous" mentally ill persons who require immediate temporary commitment. *See id.* at 341 (noting two-part inquiry whether the search procedure was (i) " 'justified at its inception' " and (ii) " 'reasonably related in scope to the circumstances which justified the interference in the first place' ") (citations omitted).[9] We think that Mass. Gen. Laws Ann. ch. 123, § 12(a), in general, and the commitment order issued by Dr. Barden, in particular, were appropriately suited to these legitimate purposes.

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9. Thus, a "mental illness" determination alone is insufficient to support an involuntary commitment order; the State must also show that the person subjected to involuntary commitment is "dangerous." *See O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975).

Appendix A

The application for temporary hospitalization, signed by Dr. Barden, expressly referenced Mass. Gen. Laws Ann. ch. 123, § 12(a), which authorizes four categories of involuntary commitment procedures:

> (1) a qualified physician, psychologist, or psychiatric nurse who has personally examined a person, and who has reason to believe that the person would create a "likelihood of serious harm," may sign a "pink paper" authorizing law enforcement officials to restrain that person to permit hospitalization for up to a ten-day period;
>
> (2) in an "emergency situation," a qualified physician, psychologist, or psychiatric nurse may sign a pink paper, even when the alleged mentally ill person refuses to submit to a medical examination, if the "facts and circumstances" suggest that the person would create a "likelihood of serious harm";
>
> (3) in an "emergency situation," a police officer may restrain a person he believes creates a "likelihood of serious harm,)' if no qualified physician, psychologist, or psychiatric nurse is available to sign a pink paper; or
>
> (4) at any time, any person may apply to the district or juvenile courts for a

> commitment order, and after a hearing, the court may issue a warrant for the apprehension and appearance of the person who creates a "likelihood of serious harm."

Mass. Gen. Laws Ann. ch. 123, § 12(a); *see infra* Appendix, for text; *see generally Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258-60 (1st Cir. 1994) (tracing history of Massachusetts emergency involuntary commitment procedure from colonial times through enactment of chapter 123). As only the category 4 commitment procedure expressly incorporates a warrant requirement, we think it clear that the statute implicitly authorizes warrantless searches and seizures in the three remaining contexts. Since Ms. Zinger repeatedly rejected family pleas that she submit to examination by a physician, and because Dr. Barden based his expert medical-psychiatric opinion exclusively on reports from family members and neighbors, we conclude also that the pink paper in this case did issue under category 2. The only question before us, therefore, concerns the constitutionality of the "category 2" warrantless search procedure.

The pink paper was based on Dr. Barden's expert opinion that Ms. Zinger "require[d] hospitalization so as to avoid the likelihood of serious harm by reason of mental illness." Dr. Barden described the particular grounds for concluding that immediate hospitalization was required:

> [Patient] has a [history] of mental illness and she was hospitalized at Danvers [State] Hospital couple of years ago. [Patient] is very angry and hostile; she is very impulsive and

> explosive. She made threats to harm her axhusband. [Patient] is dangerous to others.

The involuntary commitment application, and the Massachusetts statute, define "likelihood of serious harm" — the governing criterion for commitment — as:

> (1) a substantial risk of physical harm to the person [her]self as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person [her]self as manifested by evidence that such person's judgment is so affected that [s]he is unable to protect [her]self in the community and that reasonable provision for h[er] protection is not available in the community.

Mass. Gen. Laws Ann. ch. 123, § 1; *see Rogers*, 634 F.2d at 658. The relevant medical history, including Ms. Zinger's history of mental illness and prior hospitalization at Danvers State Hospital, and the behavioral symptoms reported to Dr. Barden by family members, plainly satisfied the second clause in the statutory definition of "likelihood of serious harm."

The statutory definition of "likelihood of serious harm," particularly its requirement that there be objective medical

indicia of "dangerousness," effectively "constitutes a codified set of 'exigent circumstances' which are constitutional under the Fourth Amendment." *Moore v. Wyoming Medical Ctr.*, 825 F. Supp. 1531, 1538 n.4, 1546 (D. Wyo. 1993). Given the notorious difficulties in predicting individual human behavior based solely on symptomatology, *id.* at 1539, we conclude that Mass. Gen. Laws Ann. ch. 123, § 1, prescribes a sufficiently clear and reasonably reliable administrative standard for ensuring that involuntary commitments are limited to imminently "dangerous" mentally ill persons in emergent circumstances.

Finally, the specific focus and overall context of the Massachusetts statute implicitly circumscribe the category 2 search procedure within narrow bounds. A police officer is permitted to enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person pursuant to a duly issued pink paper, but may not engage in a generalized search. As the officers in the instant case did not exceed these bounds, we conclude that Mass. Gen. Laws Ann. ch. 123, § 12(a), and consequently the City policy in pursuance of the statutory design, *see supra* pps. 12-14, are appropriately tailored to serve the legitimate and important State and municipal interest in ensuring that dangerous mentally ill persons not cause physical harm to themselves or others.

(b) ***Practicality of Warrant Requirement***

The determination that there exists a legitimate and substantial governmental interest in conducting a warrantless search in certain circumstances satisfies only the threshold inquiry under the reasonableness test. For an administrative search procedure to survive constitutional challenge under the "special need" exception, it must also appear that the burdens of

complying with a warrant requirement are likely to defeat the important governmental purposes the warrantless search procedure was designed to serve.

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Camara, 387 U.S. at 533.

Compliance with a warrant requirement in the context of these temporary, involuntary commitments for medical-psychiatric examination would entail critical delays in safeguarding the mentally ill person, and others, without affording commensurate privacy protections to the subject. Category 2 searches foster important governmental interests largely because the inherent imprecision in predicting the timing of any outbreak of "dangerousness" on the part of the recalcitrant, mentally ill person, *see Moore*, 825 F. Supp. at 1539, inevitably means that the time spent securing judicial approval of a pink paper represents a potentially dangerous delay of *incalculable* proportion.

In this particular case, of course, McCabe points to the undisputed evidence that the police officers waited several hours before executing the pink paper, thus demonstrating little concern that Ms. Zinger might exhibit the sort of sudden onset of

"dangerousness" alluded to in the assessment made by Dr. Barden. Although this argument might hold sway were the constitutionality of the warrantless entry dependent on an *ad hoc*, on-the-scene "exigent circumstances" determination made by the police, it is no rejoinder to the claimed "reasonableness" of a "special need" search procedure policy, which must focus not on the particular case but on the essential systemic attributes of the search procedure itself:

> The dissent argues that in this case the police had ample time to secure an arrest warrant, rendering invalid any claim that complying with traditional fourth amendment requirements was impracticable. That viewpoint distorts *Griffin's* "impracticability" prong. In *Griffin*, the Court inquired into the *systemic impracticability* of compelling those involved in implementation of a probation regime to obtain warrants. The impracticability of obtaining a warrant in the *particular case* did not enter into the equation; indeed, Justice Blackmun argued unsuccessfully for much the same sort of particularized inquiry . . . . Whether it was feasible for the police to obtain a warrant in this particular case is irrelevant for the purpose at hand.

Cardona, 903 F.2d at 68 n.7 (emphasis added; citations omitted).[10] Although the Fourth Amendment warrant

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10. There is no record evidence that the challenged City policy required officers to execute pink papers within a specified time. In all events, however, (Cont'd)

requirement imposes a minimal burden on governmental authorities in normal circumstances, we think there can be little doubt that it would delay the execution of involuntary commitment orders to *some* degree in *all* cases, thereby appreciably increasing the systemic risk that the vital protective purposes served by the State's *parens patriae* and "police power" responsibilities would be frustrated in individual cases not identifiable in advance. *See supra* Section II.D.1(a).

More importantly by far, however, the additional burdens imposed on the City and State by a universal warrant requirement in category 2 searches seem to us "undue" and "unreasonable" when viewed in relation to the minimal additional protection afforded by a requirement that a pink paper be screened by a magistrate before it is executed. The district court ruled that the Fourth Amendment warrant requirement was violated notwithstanding compliance with the "pink paper" procedure under Mass. Gen. Laws Ann. ch. 123, § 12(a), because the issuing physician "is not qualified to determine whether probable cause exists." *McCabe*, 875 F. Supp. at 61. On the other hand, the Supreme Court has noted that rigid adherence to a warrant requirement reaches its most suspect extreme where a judicial

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(Cont'd)

we do not think the several hours that elapsed between the issuance and execution of this pink paper, which enabled the constable and police to coordinate their actions, can be considered so inordinate as to call into question the emergent nature of Ms. Zinger's mental-health-related dangerousness. Whereas delay might belie "exigent circumstances," were that the warrant exception primarily relied upon by the City, no such rigid time constraints can be imposed in a particular "special need" case as a precondition to the validity of the systemic search procedure itself. Nonetheless, we express no opinion as to whether, in another case, inordinate delay in issuing and executing a pink paper might tend to undermine a predicate finding that the subject posed a real "likelihood of serious harm" at the time the finding was made.

officer lacks the innate expertise to assess the soundness of the basic ground upon which the warrant request is predicated. *See, e.g., Griffin,* 483 U.S. at 879 n. 6 (observing that "[o]ur discussion pertains to the reasons generally supporting the proposition that the search decision should be left to the expertise of probation authorities rather than a magistrate"); *cf. Rogers,* 634 F.2d at 660 ("While judicial determinations are certainly preferable in general, room must be left for responsible state officials to respond to exigencies that render totally impractical recourse to traditional forms of judicial process. 'The judicial model of fact finding for all constitutionally protected interests, regardless of their nature, can turn rational decision-making into an unmanageable enterprise.' ") (quoting *Parham v. J. R.,* 442 U.S. 584, 608 n. 16 (1979)).

A pink paper is issued or withheld principally on the strength of expert medical-psychiatric assessments (i.e., diagnoses and prognoses founded on the available evidence), whereas judicial officers normally are called upon to make judgments as to whether there is "probable cause" for an arrest or search. As the Second Circuit has pointed out:

> "[T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question — did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy

> turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists."

Project Release v. Prevost, 722 F.2d 960, 972-73 (2d Cir. 1983) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *see also O'Connor*, 480 U.S. at 723 ("Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for workrelated reasons."); *Wyman*, 400 U.S. at 324 (in the home-visitation setting, "the warrant argument is out of place" since, as a practical matter, "probable cause" is more than an agency seeks or needs to know).[11]

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11. It is largely irrelevant whether the "likelihood of serious harm" criterion in Mass. Gen. Laws Ann. ch. 123, § 12(a), approximates the "probable cause" inquiry appropriate in the search warrant context. The "probable cause" inquiry often is jettisoned in civil administrative searches:

> "[W]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." We have concluded, for example, that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied.

O'Connor, 480 U.S. at 722-23 (citations omitted); *see also T.L.O.*, 469 U.S. at 340-41 (" '[P]robable cause' is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.' ") (citations omitted).

To be sure, judicial oversight might provide some preliminary insulation against obvious abuse; for example, by screening out patently unreliable information utilized by a physician in formulating a diagnosis or prognosis, which can be a matter of particular concern in category 2 cases where the physician has not examined the patient and must rely on secondhand reports as to the subject's physical, emotional and behavioral symptoms. On the other hand, the statutory mechanism itself affords reasonable safeguards against such concerns: a pink paper can be authorized only by a licensed psychiatric physician, see Mass. Gen. Laws Ann. ch. 123, §§ 1, 12(a), whose extensive education and specialized experience and training should enable the psychiatric physician more reliably to parse such lay reports, especially those provided by family members, with the requisite professional skepticism.[12] Though this safeguard is by no means foolproof, we think it would be the exceptional case in which an expert evaluation was based on *patently* insufficient or unreliable information. Further, to the degree that judicial factfinding were thought to be necessary as a general rule, in order to ferret out *latent* unreliability in the foundational evidence (e.g., possible ulterior family motives or antipathy toward the patient) upon which

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12. The other statutory safeguards would not forestall improper warrantless entries of a subject's residence. *See Cardona*, 903 F.2d at 66 ("While the actual invasion of privacy does not occur until the search or seizure occurs, the constitutional protection is viable only to the extent that it restricts the authority responsible for making the search or seizure decision, prior to the time the decision crystallizes."). Nonetheless, the other safeguards do mitigate any resulting injury to the subject. For example, in order to detain a dangerous mentally ill person for more than ten days, the State must petition the district court, and prove beyond reasonable doubt that the patient poses a "likelihood of serious harm." *See* Mass. Gen. Laws Ann. ch. 123, §§ 7, 8 (requiring ongoing, periodic judicial review of commitment decision), 12(d); *Commonwealth v. Nassar* 406 N.E.2d 1286, 1290-91 (Mass. 1980).

expert psychiatric evaluations are based, the resulting delays in implementing involuntary commitment orders could have far more serious consequences for the mentally ill, their families, and members of the public. Finally, such a detailed factfinding mission would greatly exceed any "screening" function normally undertaken by judicial officers in reviewing search warrant applications.

We discern no sufficient justification for superimposing such a judicial factfinding mechanism upon the evaluation made by the licensed psychiatric physician in the involuntary commitment context, especially since it promises no corresponding systemic benefit to offset the systemic delays in executing pink papers in emergent circumstances. *See Griffin*, 483 U.S. at 876 ("A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires.").

2. *The Interests of the Mental Ill*

Next, we consider the extent to which the category 2 search procedure infringes legitimate Fourth Amendment interests of the mentally ill. *See T.L.O.*, 469 U.S. at 341; *cf. also, Rockwell*, 26 F.3d at 256 ("Involuntary confinement for compulsory psychiatric treatment is a 'massive curtailment of liberty.' ") (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)) (citation omitted). We point out again, however, that McCabe presently challenges only the alleged infringement of Ms. Zinger's Fourth Amendment right to be free from unreasonable governmental entries to her residence, *see supra* note 2, and does not allege an infringement of her liberty interest to be free from any unreasonable governmental restraint attending the subsequent seizure of her person.

Appendix A

(a) ***Civil Context***

Although the Fourth Amendment is implicated in a variety of civil proceedings, *Soldal*, 113 S. Ct. at 548, the Supreme Court has made it clear that the civil nature of certain search procedures may call for a narrowed application of the warrant and probable cause requirements. Where a search procedure is not designed to gather information in a criminal investigation, its relative unintrusiveness may militate in favor of relaxing the warrant requirement. *See O'Connor*, 480 U.S. at 721 ("While police, and even [some] administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate workrelated reasons wholly unrelated to illegal conduct."); *Wyman*, 400 U.S. at 323 (home visitation program "does not deal with crime or with the actual or suspected perpetrators of crime," and "[t]he caseworker is not a sleuth but rather, we trust, . . . a friend to one in need"); *see also Project Release*, 722 F.2d at 972-73 ("[T]he difference between civil and criminal confinement may nonetheless be reflected in different standards and procedures applicable in the context of each of the two systems — so long as due process is satisfied.") (citing *Addington*, 441 U.S. at 425). In the instant case, McCabe has not suggested that the challenged entry of the Zinger residence was effected for any criminal law purpose, or any regulatory purpose other than to enable her temporary hospitalization and the psychiatric examination she adamantly refused.

(b) ***Impartiality of Decisionmaker***

Finally, it is most significant in the present context that the official decision to initiate an involuntary "category 2"

commitment rests with a licensed psychiatric physician, not with law enforcement officials. *See Steagald*, 451 U.S. at 212 (noting that the Fourth Amendment warrant requirement interposes "neutral" and detached judicial officer between police and "probable cause" determination). The Supreme Court consistently premises "special need" warrant exceptions on the presence of a search authorization by an impartial, or at least a relatively impartial person. *See Cardona*, 903 F.2d at 64-65 ("The [*Griffin*] Court's focus was on the degree of security inherent in allowing a particular decisionmaker, i.e., a probation officer, to make a particular decision, i.e., whether a probationer's home should be searched, based on a particular (relatively modest) level of proof, i.e., 'reasonable grounds.' "). Unlike the characteristic relationship between law enforcement personnel and criminal suspects, a committing physician's relationship with a patient, or even a nonpatient, is in no sense adversarial.

The role of the licensed physician under Massachusetts law is to provide a neutral, objective assessment of the "dangerousness" and "likelihood of serious risk" criteria upon which the involuntary commitment decision depends. A physician's ethical responsibilities likewise require that appropriate medical-psychiatric criteria be utilized in assessing the condition of the subject person. *Cf., e.g., Griffin*, 483 U.S. at 876 ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen. He is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer."). Nor is there any allegation or evidence that the Lynn police possessed or exercised any influence, direct or i indirect, over the

medical-psychiatric decision to issue the pink paper. *Cf. T.L.O.*, 469 U.S. at 337 n.5 ("Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials.").

The district court nonetheless struck down the City policy because "the agents of the doctors in this case are police officers with guns and batons, not hospital orderlies and nurses," so that "[t]here is no therapeutic relationship which a warrant mechanism would disrupt." *McCabe*, 875 F. Supp. at 61.[13] Whether an administrative search procedure leaves too much discretion to law enforcement officers in the field is a recurring Fourth Amendment concern. *See, e.g., Camara*, 387 U.S. at 532-33 ("The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."). Under Mass. Gen. Laws Ann. ch. 123, § 12(a), however, the decision to conduct a category 2 "search" is never left to the executing officers. Moreover, the mere fact that law enforcement officials

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13. Although there is no evidence that Dr. Barden had been Ms. Zinger's regular physician, the challenged City policy is to be evaluated in light of its systemic traits and purposes. *Cf. Cardona*, 903 F.2d at 67; *supra* pp. 22-23. No doubt many, if not most, category 2 searches are executed pursuant to pink papers issued by the subject-patient's current or former psychiatric physician. Unlike law enforcement officers, who rarely interact with a search target on more than one occasion, as a rule physicians possess reliable personal knowledge of their patients, based on an ongoing doctor-patient relationship. *Cf. Griffin*, 483 U.S. at 879 ("As was true, then, in [*O'Connor*] . . . and [*T.L.O.*], we deal with a situation in which there is an ongoing supervisory relationship — and one that is not, or at least not entirely, adversarial — between the object of the search and the decisionmaker.").

serve as the agents who implement the authorizing physician's decision to approve a category 2 search does not necessarily mean that the procedure is not within the "special need" category:

> [W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the § 415-a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. . . . As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

Burger, 482 U.S. at 717-18; *Cardona*, 903 F.2d at 65 ("The [*Griffin*] Court did not lend any special salience to the identity of

the person(s) executing the search"; "[w]hether the decision, once reached [by the probation officer], is realized through police officers, parole officers, or a tag team representing both camps, is peripheral to the Court's holding.").

We conclude that these considerations, on balance, favor a limited "special need" exception to the warrant requirement in the particular setting presented in this case. Accordingly, we hold that the Fourth Amendment is not infringed by the challenged City policy, which authorizes warrantless entries of residences by the police for the sole purpose of executing a properly issued category 2 pink paper within a reasonable time after its issuance.

III

CONCLUSION

We retrace the bounds of our ruling. We do not suggest that the factors we have discussed, *see* Section II.D, alone or in combination invariably provide adequate support for a "special need" exception to the warrant requirement. The balancing test for determining whether an administrative procedure comes within the "special need" exception is designedly fact-specific, and must be calibrated anew in assessing the reasonableness of each administrative search procedure to which it is applied. Nor, of course, do we suggest that all comparable state involuntary commitment statutes, or any other provision of Mass. Gen. Laws Ann. ch. 123, or other categories of searches authorized under chapter 123, section 12(a), necessarily satisfy the Fourth Amendment. *See, e.g., Wyman,* 400 U.S. at 326 ("Our holding today does not mean . . . that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early

morning mass raid upon homes of welfare recipients is not unknown."). We hold only that law enforcement officers in possession of a pink paper, duly issued pursuant to category 2, Mass. Gen. Laws Ann. ch. 123, § 12(a), may effect a warrantless entry of the subject's residence within a reasonable time after the pink paper issues.

Since the challenged City policy comports with the "special need" exception to the Fourth Amendment warrant requirement, the City is entitled to summary judgment. We intimate no viewpoint concerning any other aspect of these proceedings, including the McCabe claims against the individual police officers, the constable, and the ambulance crew, which claims were dismissed, without prejudice. *See supra* note 3.

The district court judgment is reversed and the case is remanded to the district court for further proceedings consistent with this opinion; costs to appellant.

Appendix A

APPENDIX

Chapter 123, Section 12:

(a) Any physician who is licensed pursuant to section two of chapter one hundred and twelve or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section eighty B of said chapter one hundred and twelve or a qualified psychologist licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive of said chapter one hundred and twelve, who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department.

If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist on the basis of the facts and circumstances may determine

that hospitalization is necessary and may apply therefore.

In an emergency situation, if a physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

. . . .

(e) Any person may make application to a district court justice or a justice of the juvenile court department for a ten day

commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed ten days, but the superintendent may discharge him at any time within the ten day period.

APPENDIX B — CORRECTED MEMORANDUM AND DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 2, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 92-12179-NG

MARY MCCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,

Plaintiff,

v.

THE CITY OF LYNN, SERGEANT RICHARD DONNELLY, a Sergeant in the Lynn Police Department, Individually, OFFICER GARY TWYMAN, an officer in the Lynn Police Department, OFFICER WILLIAM ALPHEN, an officer in the Lynn Police Department, Individually, CAPTAIN CSUKA, a Captain in the Lynn Police Department, Individually, and in his Official Capacity, YAKOV BARDEN, M.D., TRI-CITY MENTAL HEALTH HOSPITAL, JOHN DOE, Superintendent, Tri-City Mental Health Hospital, DAVID RANDO, EDWARD MARTICIO, LIFE-LINE AMBULANCE SERVICE, INC., and KENNETH JACKSON,

Defendants.

GERTNER, D.J.

The following is a corrected version of the Memorandum and Decision issued on January 26, 1995. This version differs from the original only insofar as typographical and sentence structure errors have been corrected.

Dated: February 2, 1995

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 92-12179-NG

MARY MCCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,

Plaintiff,

v.

THE CITY OF LYNN, SERGEANT RICHARD DONNELLY, a Sergeant in the Lynn Police Department, Individually, OFFICER GARY TWYMAN, an officer in the Lynn Police Department, OFFICER WILLIAM ALPHEN, an officer in the Lynn Police Department, Individually, CAPTAIN CSUKA, a Captain in the Lynn Police Department, Individually, and in his Official Capacity, YAKOV BARDEN, M.D., TRI-CITY MENTAL HEALTH HOSPITAL, JOHN DOE, Superintendent, Tri-City Mental Health Hospital, DAVID RANDO, EDWARD MARTICIO, LIFE-LINE AMBULANCE SERVICE, INC., and KENNETH JACKSON,

Defendants.

CORRECTED MEMORANDUM AND DECISION

GERTNER, D.J.

Appendix B

CORRECTED MEMORANDUM AND DECISION

FEBRUARY 2, 1995

I. INTRODUCTION

This case involves Rose Zinger who survived the Holocaust only to die at the hands of the Lynn Police. At issue is the policy of the Lynn Police to forcibly enter individuals' homes to serve involuntary commitment[1] orders, without a warrant, and solely on the authority of the officers on the scene. I find that this policy violates the Fourth Amendment's plain prohibition against the warrantless searches of homes, and seizures of persons.

After obtaining an order of involuntary commitment for Ms. Rose Zinger (a resident of Lynn), the Lynn Police served the order by breaking down her door and forcing her down a flight of stairs. Tragically, during this incident Ms. Zinger suffered a heart attack and died.

On September 4, 1992, the Administratrix of Ms. Zinger's estate (plaintiff Mary McCabe) filed a complaint seeking relief under 42 U.S.C. § 1983 and certain common law claims against the defendants City of Lynn and various individual officers for the death of Ruchla "Rose" Zinger (hereafter "Zinger"). In addition, plaintiff sued Life-Line Ambulance Service, Inc. (hereinafter "Life-Line Ambulance"), two of its emergency medical technicians (hereinafter "EMTs") and a number of other defendants on common law negligence, assault and battery

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1. I use the phrases "involuntary commitment" and "civil commitment" interchangeably to deal with proceedings under M.G.L. ch. 123 § 12.

theories.[2] The motions for summary judgment concern only the civil rights claims against the City of Lynn and the negligence claims against the two EMTs of Life-Line Ambulance.[3]

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2. The complaint alleged that: (1) Lynn Police Sergeant Donnelly and Officers Twyman and Alphen deprived Ms. Zinger of her constitutional rights in violation of 42 U.S.C. § 1983 (Count I); (2) Captain John Csuka deprived Zinger of her constitutional rights in violation of 42 U.S.C. § 1983 by failing to supervise the officers under his direction (Count II); (3) the City of Lynn maintained a policy which deprived Zinger of her constitutional rights (Count III); (4) the City of Lynn breached a duty it owed to Zinger which proximately caused her death (Count IV); (5) Dr. Yakov Barden was negligent in failing to follow appropriate procedures in Zinger's involuntary commitment (Count V); (6) Tri-City Mental Health Hospital was negligent in failing to follow the appropriate procedures in Zinger's involuntary commitment (Count VI); (7) defendants David Rando, Edward Marticio and Life-Line Ambulance Services, Inc. were negligent in failing to provide adequate care to Zinger (Count VII); (8) defendants Donnelly, Twyman and Alphen assaulted and battered Zinger causing her death (Count VIII); (9) defendants Rando and Marticio assaulted and battered Zinger causing her death (Count IX); and (10) defendant Jackson breached a duty he owed Zinger by failing to intervene on behalf of Zinger when the Lynn Police Officers deprived the Zinger of her civil rights (Count X).

In a letter to the Court dated June 14, 1993, counsel for defendant Tri-City informed the Court that the claims against Tri-City and Dr. Barden had been settled. At a settlement conference held on January 3, 1995, plaintiff's counsel informed the Court that they had reached a settlement with defendant Jackson. After this Court made its preliminary ruling on the instant motions for summary judgment — that the City of Lynn's policy violated the Fourth Amendment — plaintiff's counsel informed the Court that they had reached a settlement agreement with the individual police officers named in the complaint.

3. On May 4, 1994, the City of Lynn filed a motion for summary judgment. On June 15, 1994 defendants Rando and Marticio filed motions for summary judgment. The Court heard oral argument on the summary judgment

(Cont'd)

Appendix B

For the-reasons described below, the defendants' motion for summary judgment is hereby **DENIED** and the plaintiff's cross motion for summary judgment against the City of Lynn is hereby **GRANTED**.

II. SUMMARY OF THE FACTS

Rose Zinger was a 64 year old woman living on 11 Nichols Avenue in Lynn, Massachusetts. Zinger spoke and understood limited English; she suffered from high blood pressure and was extremely overweight. In addition to her physical maladies, Zinger suffered from psychological problems, which according to the Complaint, were the product of, among other things, her experiences during World War II.[4]

On September 6, 1989, Dr. Yakov Barden of the Tri-City Mental Health and Retardation Center, signed an application for Zinger's involuntary commitment pursuant to M.G.L. ch. 123 § 12(a). The next day, Captain Joseph Csuka of the Lynn Police Department instructed Sergeant Richard Donnelly, and Officers Gary Twyman and William Alphen (all of the Lynn Police Department) to serve the civil commitment order. Csuka, although in possession of the order since the morning of September 7th, informed Sergeant Donnelly that the

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(Cont'd)
motions on September 16, 1994. The City of Lynn filed a second motion for summary judgment on December 6, 1994 addressing the constitutionality of its policy of allowing forcible entries to serve civil commitment papers. Finally, on December 14, 1994, the plaintiff filed a joint memorandum in opposition to the City of Lynn's second motion for summary judgment and a cross motion for partial summary judgment on the same issue.

4. According to the Complaint, Zinger was a survivor of the Holocaust who lost many friends and family "at the hands of Nazis."

commitment would be carried out at 1:00 p.m. According to the affidavit of Sergeant Donnelly, Captain Csuka advised him that Zinger would not cooperate with them and they would have to force their way into her house.

In addition to the involuntary commitment, proceedings had been brought against Zinger resulting in an eviction order. Indeed, the police officers concede that the civil commitment was delayed until 1:00 p.m. in order to accommodate defendant Kenneth Jackson (a State Constable) who would secure the premises following the eviction and commitment.

At the scene, Constable Jackson informed the officers that based on his prior attempts to serve eviction notices, he believed Zinger would not answer the door. He instructed them to go to the rear door for the easiest point of entry into the home. The officers knocked on the door and rang the doorbell. Zinger did not answer. After approximately one minute, Donnelly ordered Alphen to kick down the door. Once through the door all three officers and Constable Jackson proceeded up the stairs to a second door which was also locked. Officer Alphen knocked on this door and said "Hello, Police." When no one answered the knocking, Donnelly ordered Alphen to kick this door down. After kicking through one panel, Zinger came to the door and opened it slightly. Donnelly showed Zinger the commitment order and told her that she needed to see a doctor. Zinger, who spoke and understood little English, yelled "why, why, no doctors" and started to close the door. Donnelly forced his foot between the door preventing it from closing all the way.

At this point, the officers claim that Zinger reached for a small knife on the kitchen table. Upon seeing the knife Officer

Alphen pushed Zinger through the door and to the floor.[5] Zinger lay face down on the ground, confused and screaming.

With Zinger forced into a prone position, all three officers handcuffed the 64 year old woman who struggled and screamed. During the process, Zinger was so distraught she urinated on herself and one of the officers.

Shortly after arriving at the scene, the officers called defendant Life-Line Ambulance to transport Zinger to the mental health facility. While waiting for the ambulance, the officers claim that they made repeated attempts to calm Zinger down. When defendants Marticio and Rando (the Life-Line emergency medical technicians) arrived, they informed the officers that due to Zinger's obesity and disposition, they could not carry her down the stairs in a chair or stretcher. Upon hearing this, the officers forced Ms. Zinger down the stairs on her buttocks one step at a time.

After bringing her to the bottom of the stairs, the officers placed her face down on a stretcher, where she was strapped in, still handcuffed behind her back. Shortly thereafter, one of the defendants noticed blood coming down the side of Zinger's mouth.

The officers then removed the handcuffs and Marticio examined her. Finding no pulse, Marticio and one of the officers began performing CPR. Zinger was pronounced dead at 2:00 p.m.

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5. According to Constable Jackson's deposition, Zinger never actually reached the knife on the table, nor held the knife in her hand.

Appendix B

III. THE SUMMARY JUDGMENT STANDARD

Summary judgment should be granted where all of the relevant pleadings, viewed in the light most favorable to the non moving party, present no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Alan Corp. v. International Surplus Lines Insurance Co.*, 22 F.3d 339, 342 (1st Cir. 1994); *Aponte-Santiago v. Lopez Rivera*, 957 F.2d 40, 41 (1st Cir. 1992); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

IV. THE CITY OF LYNN

A. Liability under 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a private cause of action for individuals who are subject to a deprivation of their constitutional rights by persons acting under color of state law. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978) the Court determined that municipalities and other local government units were to be included among those "persons" to whom § 1983 applies so long as certain preconditions were met. As Justice Brennan stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted *solely* by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

> official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694 (emphasis added).

To establish liability against a municipality under § 1983 after *Monell*, a plaintiff must prove that: (1) the municipality maintained a policy or custom; and (2) the same custom or policy was the cause of and the moving force behind the deprivation of the plaintiff's constitutional rights. *Bordanaro v. Mcleod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted); *Oklahoma City v. Tuttle*, 471 U.S. 808, 819 (1984).

The plaintiff contends that the City of Lynn's policy of making warrantless entries into private residences to serve civil commitment process constituted a deprivation of Rose Zinger's right to be free from unreasonable searches and seizures. It was that policy, plaintiff contends, that led to Ms. Zinger's injury and ultimately her death.

B. The Policy of Serving Involuntary Commitment Orders

To support its claim that a municipal policy existed, the plaintiff points to the deposition of John W. Suslak, the City of Lynn's Rule 30(b)(6) witness who was designated the most "knowledgeable regarding the rules, regulations, and policies of the Lynn Police Department regarding the serving of involuntary commitment papers." Plaintiff's Memorandum in Opposition to the City of Lynn's Motion for Summary Judgment at p. 10. At his deposition, Suslak stated:

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> I think that the officers at the scene would be obligated to take all reasonable efforts to make a peaceable entry if, in fact, under the circumstances, they were confronting, that would be safer to do. And then if they were, in fact, were advised that someone inside the apartment where we had a pink paper,[6] escalate the degree of force to effect necessary to make an entry to effect the pink paper.

Id at p. 9. In other words, the City of Lynn's policy was to try to effect a peaceful execution of a civil commitment order in the first instance. But, should there be resistance, the police were authorized to "escalate the degree of force" necessary to effect the hospitalization. There was no requirement that a neutral magistrate intercede, or that a warrant be sought prior to the seizure of a human being or to the entry of a home. The officer on the line, armed only with a ten day commitment authorization, could decide when and whether to break down the door to someone's home[7] and seize them.

It is uncontested that the officers at 11 Nichols Avenue, acting pursuant to an official municipal policy, broke into Rose Zinger's apartment, and that this municipal policy could be found to have triggered the set of circumstances leading to her injury and death. The only question for summary judgment is whether the City's policy violated the Fourth Amendment.

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6. "Pink paper" is the colloquial name for a § 12 commitment order.

7. Indeed the policy apparently allowed the officers to break into a third party home if the subject of the commitment order was present.

Appendix B

C. Warrantlese Searches of a Dwelling are Presumptively Unreasonable.

The Fourth Amendment is unequivocal:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment's goal is the protection of personal privacy, and the fundamental dignity of citizens. The method of choice for protecting that goal is the warrant mechanism which requires a neutral magistrate to evaluate the facts and determine whether and when government officials may search.

The specter of police officials breaking down the door of a private home has been, from the drafting of the Fourth Amendment to the present, a singularly frightening one. Traditionally, a citizen's home has been singled out for special protection. *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home.")

Of equal, if not greater, significance is the seizure of the human being herself, the deprivation of her liberty. *Henry v.*

United States, 361 U.S. 98, 100 (1959) ("For it is the command of the Fourth Amendment that no warrants for *either* searches or arrests shall issue except 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' ") (emphasis added.)

So important is the protection of personal privacy and the fundamental dignity of individuals against the unwarranted intrusion of governmental officials that the Supreme Court has held that all warrantless searches and seizures are presumptively unreasonable. *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Camara v. Municipal Court of the City & County of San Francisco*, 387 U.S. 523, 528 (1967); *Payton v. New York*, 445 U.S. 573, 586 (1980).

The exceptions to the warrant requirement are limited in number and strictly construed. *Katz v. United States*, 389 U.S. 347 (1967). Those situations include: fear of imminent destruction of evidence; the "hot" pursuit of a fleeing suspect; immediate threats to the public safety; and fires or other emergencies. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984). These "exigencies" suspend the Fourth Amendment's requirements only because pre-search compliance would be impossible if not dangerous to the surrounding community. *United States v. Irizarry*, 673 F.2d 554, 557 (1st Cir. 1982) (" 'Exigent circumstances' have traditionally been found in those crisis situations when there is compelling need for official action and no time to secure a warrant.") (*citing Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (warrantless entry into a burning building to put out a blaze). *See also Chimel v. California*, 395 U.S. 752, *reh'g. denied*, 396 U.S. 809 (1969) (search "incident to arrest"); *Warden v. Hayden*, 387 U.S. 294 (1967) (warrantless

entry in "hot" pursuit of an armed robber); *Ker v. California*, 374 U.S. 23, 40-43 (1963) (warrantless entry to prevent destruction of evidence where such destruction is reasonably thought imminent); *United States v. Zurosky*, 614 F.2d 779 (1st Cir. 1979) (warrantless entry into warehouse at 4:25 a.m. when activity inside reasonably suggests that a breaking and entering is taking place); *United States v. Edwards*, 602 F.2d 458, 468 (1st Cir. 1979) (warrantless entry to prevent destruction of heroin reasonably thought imminent); *United States v. Miller*, 589 F.2d 1117, 1126 (1st Cir. 1978), *cert. denied*, 440 U.S. 958, (1979) (warrantless entry and reentry of a boat where drowning suspected and tidal flow created need for swift action).

To be sure, in certain non-criminal, regulatory or administrative situations, the Court has held that the Fourth Amendment did not apply at all, or that the high level of protection offered by a warrant was unnecessary so long as the search was otherwise "reasonable." For the most part, these involve instances where the Court has characterized the intrusion as far less invasive than traditional searches and seizures.[8] In *Wyman v. James*, 400 U.S. 309, 326 (1971), for example, the Supreme Court upheld a New York statute which made receipt of welfare benefits contingent upon the

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8. For example, *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (finding warrantless search of a parolee's home by probation officials reasonable); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (allowing warrantless, work-related searches of employee's desks and offices without probable cause); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (school officials may conduct warrantless searches of some student property without probable cause); *New York v. Burger*, 482 U.S. 691 (1987) (permitting warrantless search of automobile junkyards as business "closely regulated" by the state); *United States v. Cardona*, 903 F.2d 60, 69 (1st Cir. 1990) (finding warrantless arrest of parole violator in his home valid as a "special needs" exception to the warrant requirement).

beneficiary's assent to a home visit by a state social worker. In upholding the statute, the *Wyman* Court stated that "the home visitation as structured by the New York statutes is a reasonable administrative tool; that it serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment." *Wyman*, 400 U.S. at 326. The Court rested its decision on a determination that the purpose of the home visit requirement was "both rehabilitative and investigative," and thus, not the functional equivalent of a search in the traditional criminal law context. *Wyman*, 400 U.S. at 317.

Although warrantless social worker "visitations" may be minimally invasive and fail to trigger the warrant protections of the Fourth Amendment, the warrantless entry into a private dwelling for the sole purpose of seizing and forcibly hospitalizing the resident is surely another matter.[9]

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9. In *Soldal v. Cook County, Illinois*, __ U.S. __, 113 S.Ct. 538 (1992) for instance, the Court determined that police officers that conspire with private individuals to execute an illegal self help eviction are liable for violations of the Fourth Amendment. The seizure and removal of the plaintiff's home fit within the Amendment's protections no matter how the action was labelled. The Court noted:

> In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question of whether the [Fourth] Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house

(Cont'd)

When liberty is involved, as well as the privacy of one's home, the highest protection of the Fourth Amendment, namely the warrant mechanism is required. When referring to the warrantless entry of a home to execute an arrest warrant, the Court in *Payton v. New York*, 445 U.S. 573, 588 (1980), cited to the following language, with approval:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

citing United States v. Reed, 572 F. 2d 412, 423 (1978), *cert. denied sub. nom. Goldsmith v. United States*, 439 U.S. 913.

D. The Requirements of the Fourth Amendment Apply to Entries Under M.G.L. ch. 123 § 12

The function of M.G.L. ch. 123 § 12 is to provide the

(Cont'd)

> was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Soldal, 113 S.Ct. at 548 (quoting *Camara*, 387 U.S. at 530).

Appendix B

Commonwealth with the ability to place an individual in the custody of a hospital facility in order to prevent serious harm as a result of the individual's mental illness. It provides a method for exercising control over the individual, to deprive him or her of liberty and necessarily, privacy, even if only on a temporary basis. While the label may be beneficent — for the patient's own good or the good of the society — the fact remains that it is a seizure of the person, effected in this case by a forcible entry into a citizen's home.

The City of Lynn argues that an application for an order of involuntary commitment — completed by a *physician* — by statute obviates the need for a warrant. While the statute provides for a warrant proceeding, Lynn claims that it only applies when an individual *other* than a physician or a police officer seeks a ten-day commitment. M.G.L. ch. 123 § 12(a) permits a licensed physician or psychologist to "restrain or authorize the restraint of [a] person and apply for hospitalization of such person for a ten day period" based on a finding of "a likelihood of serious harm by reason of mental illness," apparently on that physician's own authority. In fact, the statute does not require the doctor to personally examine the patient, but may make the diagnosis based upon "facts or circumstances" represented to him. Section 12(e) permits "any person" to apply for a ten-day commitment but specifies that the application must be made to "a district court justice." The District Court must hold a hearing and, if it determines that the evidence is sufficient, it "may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper."

It might be suggested that this is a valid procedure because civil commitment processes are medical, or therapeutic, and as a result, less invasive than a traditional criminal search (as in

Wyman v. James, supra). Indeed, one might argue that the fact that a physician is apparently in charge, and that this is "only" a ten-day institutionalization subject to a court review makes it a "reasonable" civil entry, without requiring the formal protection of a warrant. *See* e.g. Note, *Rehabilitation, Investigation, and the Welfare Home Visit*, 79 Yale L.J. 746 (March 1971).

I disagree. Although a certified physician or psychologist might be uniquely qualified to evaluate the emotional condition of a patient, he or she is not qualified to determine whether probable cause exists to support an unconsented entry of an individual's home or seizure of an individual. The Constitution specifically imparts that responsibility to the judiciary. *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (per curiam) (*quoting Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted)); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *see also United States v. Place*, 462 U.S. 696, 701 (1983).

Moreover, the agents of the doctors in this case are police officers with guns and batons, not hospital orderlies and nurses. There is no therapeutic relationship which a warrant mechanism might disrupt. That disruption has already occurred once the police — unaccompanied by physicians or health personnel — seek a forcible entry and seizure. In fact, the parties constantly referred to the service of the commitment order as a "police matter." In any case, to the person whose home is broken into, to the neighbors who watch her dragged from her home screaming and struggling, the words "medical" or "therapeutic" would seem to be a misnomer.[10]

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10. In fact, substantial privacy issues would arise if a civil commitment order were served when the subject was at the home of another, who does not consent to entry. *See Steagald v. United States*, 451 U.S. 204 (1981) (requiring a search warrant for a third person's home to effect an arrest of a suspect located therein).

In effect, Lynn suggests that a physician's blessing somehow strips a putative mental patient of the safeguards of the Fourth Amendment, a result that would be untenable. As the experience of the former Soviet Union suggests, coerced hospitalization, ostensibly because of mental illness, is uniquely susceptible to abuse. Indeed, Massachusetts was one of the innovators in identifying the risks to individual liberty and dignity in the civil commitment process. The legislature achieved this by hedging the statute with strict safeguards — that the order of commitment be temporary unless certain standards are met, that the order be subject to periodic judicial review — and that a warrant be required under certain circumstances. I believe that this case is one of them.[11]

E. There Were no Exigent Circumstances Justifying Dispensing with the Warrant Requirement

There were no exigent circumstances in this case, justifying the suspension of the warrant requirement. The test for determining the presence of exigent circumstances which would suspend the warrant requirement "is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980). The burden of proving the necessity for a warrantless search is on the Government, and that burden is a substantial one. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1983).

The determination of exigent circumstances rests on "the

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11. The statute does not mandate a different interpretation. Indeed, a saving constitutional interpretation is entirely consistent with the statutory framework. A warrant would be required whenever it is clear that the "pink paper" will not be voluntarily complied with, that police officers will be involved, and force is threatened.

gravity of the underlying offense; whether delay poses a threat to police or the public safety; whether there is a great likelihood that evidence will be destroyed if there is delay until a warrant can be obtained." *United States v. Curzi*, 867 F.2d 36, 41-42 (1st Cir. 1989) (*quoting United States v. Veillette*, 778 F.2d 899, 902 (1st Cir. 1985)). *See also United States v. Wilson*, 36 F.3d 205, 209-210 (1st Cir. 1994) (finding exigent circumstances to enter an apartment in housing development and seize contraband).

The only exigent circumstances that the City points to are those underlying the civil commitment order itself: (1) that the statute requires that an order may only be issued "so as to avoid the likelihood of serious harm by reason of mental illness"; and (2) that Dr. Barden's application specifically notes that Ms. Zinger is dangerous to others.

According to the depositions submitted, the application for an involuntary order of commitment for Ms. Zinger was completed by Dr. Barden on September 6, 1989. Constable Jackson arranged for the application to be taken from Dr. Barden's office to the Lynn Police station on the next day. Jackson discussed the situation with Captain Csuka, informing the officer that he would be conducting the eviction proceeding at 1:00 p.m. Csuka agreed to that hour and informed Jackson that he would have Lynn Police Officers meet Jackson at 11 Nichols Avenue to serve the commitment order. At 10:30 a.m., Csuka, true to his word, ordered Sergeant Donnelly to meet Jackson at the premises at 1:00 p.m. to serve the order. Csuka further informed Donnelly that the officers serving the order might have to force their way into Zinger's home.

The presence of Dr. Barden's application for the order of involuntary commitment did not amount to exigent

circumstances justifying the forced warrantless entry into Zinger's home. To the contrary, the Lynn Police acted with *leisure* in arranging a convenient time to effectuate the service of the involuntary commitment order. The determinative issue was convenience, dovetailing the service of the commitment order with the service of the eviction papers. As Justice Jackson stated in *McDonald v. United States*:

> When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

335 U.S. 451, 459-460 (1948). No such consequences were present here.

Based upon Constable Jackson's prior attempts to serve the eviction process the officers had no indication that waiting a few hours would present an immediate threat to either Ms. Zinger or the community. Moreover, since the officers already had information that Ms. Zinger would not let them into her home, they could have presented that information and the involuntary commitment order to a magistrate *prior* to their attempt to serve the order at 1:00 p.m. Instead, the officers (following City policy) chose to break into Zinger's home to serve the civil commitment order. Therefore, no emergency situation existed which would justify the officers' entry into Zinger's home without a warrant. *See, Suss v. A.S.P.C.A.*, 823 F.Supp. 181, 187-188 (S.D.NY 1993) (finding no exigent circumstances to justify ASPCA breaking into a business to rescue a cat trapped in adjoining alley). Accordingly, the plaintiff's cross motion for summary judgment against the City of Lynn is **GRANTED**.

Appendix B

V. DEFENDANTS MARTICIO AND RANDO

Defendants Marticio and Rando argue that M.G.L. ch. 111C § 14 grants emergency medical technicians immunity from liability and therefore they are entitled to judgment as a matter of law. M.G.L. ch. 111C § 14 states in relevant part:

> No emergency medical technician certified under the provisions of this Chapter[12] and no police officer or fire fighter, who in the performance of his duties and in ***good faith*** renders emergency first aid or transportation to an injured person or to a person incapacitated by illness shall be personally in any way liable as a result of rendering such aid or as a result of transporting such person to a hospital or other safe place.

(emphasis added). The issue here is whether Rando and Marticio acted in good faith when they "treated" Zinger.

The defendants are entitled to a presumption in favor of good faith. *Spiegal v. Beacon Participations, Inc.*, 297 Mass. 398, 416-417 (1937); *Ramos v. Board of Selectmen of Nantucket*, 16 Mass.App.Ct. 308, 314 (1983). In *Ramos*, the court described bad faith as:

> [A] general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty

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12. Both Rando and Marticio were certified emergency medical technicians at the time of the incident.

> through some motive of interest or ill will. It partakes of the nature of fraud.

Ramos, 16 Mass. App.Ct. at 314.

Here, the plaintiff offered testimony that Ms. Zinger was left unattended, lying face down on a stretcher handcuffed behind her back, that the EMTs never interceded concerning the way in which she was being restrained by the police and never monitored her medical condition. Under these circumstances, the plaintiff satisfied its burden and overcame the presumption of good faith sufficient to create a material issue of fact as to whether defendants Rando and Marticio acted in good faith and are therefore entitled to the protection of M.G.L. ch. 111C § 14.[13] Accordingly, defendants Rando and Marticio's motion for summary judgment is hereby **DENIED**.

VI. CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is hereby **DENIED** and the plaintiff's cross motion for summary judgment against the City of Lynn is hereby **GRANTED**.

SO ORDERED.

Dated: February 2, 1995 s/ Nancy Gertner
NANCY GERTNER, U.S.D.J.

---

13. In other jurisdictions which have a "good samaritan" statute similar to M.G.L. ch. 111C § 14, the issue of whether the EMTs acted in good faith was a matter of fact reserved for the jury. *Wright v. City of Los Angeles*, 219 Cal.App.3d 318, 346-347 (2d. Dist., 1990) (affirming jury's award of damages against paramedics for gross negligence).

APPENDIX C — RELEVANT CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA-1787

ARTICLE [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix C

MASS. GEN. L. CH. 123

123:1. Definitions.

Section 1. The following words as used in this section and sections two to thirty-seven, inclusive, shall, unless the context otherwise requires, have the following meanings:

"Commissioner", the commissioner of mental health.

"Department", the department of mental health.

"Dependent funds", those funds which a resident is unable to manage or spend himself as determined by the periodic review.

"District court", the district court within the jurisdiction of which a facility is located.

"Facility", a public or private facility for the care and treatment of mentally ill persons, except for the Bridgewater State Hospital.

"Fiduciary", any guardian, conservator, trustee, representative payee as appointed by a federal agency, or other person who receives or maintains funds on behalf of another.

"Funds", all cash, checks, negotiable instruments or other income or liquid personal property, and governmental and private pensions and payments, including payments pursuant to a Social Security Administration program.

"Independent funds", those funds which a resident is able to manage or spend himself as determined by the periodic review.

Appendix C

"Likelihood of serious harm", (1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

"Qualified physician", a physician who is licensed pursuant to section two of chapter one hundred and twelve who is designated by and who meets qualifications required by the regulations of the department; provided that different qualifications may be established for different purposes of this chapter. A qualified physician need not be an employee of the department or of any facility of the department.

"Qualified psychologist", a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve who is designated by and who meets qualifications required by the regulations of the department, provided that different qualifications may be established for different purposes of this chapter. A qualified psychologist need not be an employee of the department or of any facility of the department.

"Restraint", bodily physical force, mechanical devices, chemicals, confinement in a place of seclusion other than the placement of an inpatient or resident in his room for the night, or

any other means which unreasonably limit freedom of movement.

"Superintendent", the superintendent or other head of a public or private facility.

123.12. Emergency restraint of dangerous persons; application for hospitalization examination.

Section 12. (a) Any physician who is licensed pursuant to section two of chapter one hundred and twelve or a qualified psychologist licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive of said chapter one hundred and twelve, who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician or qualified psychologist on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician or qualified psychologist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information

which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

(b) Only if the application for hospitalization under the provisions of this section is made by a physician specifically designated to have the authority to admit to a facility in accordance with the regulations of the department, shall such person be admitted to the facility immediately after his reception. If the application is made by someone other than a designated physician, such person shall be given a psychiatric examination by a designated physician immediately after his reception at such facility. If the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness he may admit such person to the facility for care and treatment.

(c) No person shall be admitted to facility under the provision of this section unless he, or his parent or legal guardian in his behalf, is given an opportunity to apply for voluntary admission under the provisions of paragraph (a) of section ten and unless he, or such parent or legal guardian has been informed (1) that he has a right to such voluntary admission, and (2) that the period of hospitalization under the provisions of this section cannot exceed ten days. At any time during such period of hospitalization, the superintendent may discharge such person if he determines that such person is not in need of care and treatment.

(d) A person shall be discharged at the end of the ten-day period unless the superintendent applies for a commitment under the provisions of sections seven and eight of this chapter or the person remains on a voluntary status.

(e) Any person may make application to a district court justice for a ten day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgement the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed ten days, but the superintendent may discharge him at any time within the ten day period.

APPENDIX D — APPLICATION FOR TEMPORARY HOSPITALIZATION

Department of Mental Health
Provisional Form 5A, July 1, 1971

Effective November 1, 1971

COMMONWEALTH OF MASSACHUSETTS

APPLICATION FOR TEMPORARY HOSPITALIZATION
(Ref. Section 12, Chapter 123, General Laws)

To the Superintendent of the *Tri-City Mental Health* Hospital.

I hereby apply for care in the above hospital for a period not exceeding ten days of *Ruhlya* [sic] *Zinger* who, in my opinion requires hospitalization so as to avoid the likelihood of serious harm* by reason of mental illness, *..... I have/***have not** personally examined said person. Evidence supporting my opinion includes:

[Patient] has a [history] of mental illness and she was hospitalized at Danvers [State] Hospital couple of years ago. [Patient] is very angry and hostile; she is very impulsive and explosive. She made threats to harm her ex-husband. [Patient] is dangerous to others.

The following additional information is submitted:

1. Personal data regarding patient

   a. Sex *female*

   b. Address (street, town, state) *11 Nichols Ave. Lynn, MA*

Appendix D

c. Birthdate (month, day, year)

d. Birthplace *Lynn* [sic]

e. Occupation *Retired*

f. Soc. Sec. No. *Unknown*

g. Marital state (underline): Never married, married, remarried, separated, ***divorced***, widowed.

h. Place and time of most recent psychiatric or retardation care (if none, so state): *None*

i. Prior care at this hospital (underline): yes. ***no***.

j. Name, address, and telephone number of husband, wife, nearest relative, or friend:

2. Other relevant data which may assist the admitting physician, including medical, medication administered and reasons for restraint:

May restrain PRN

Signed s/ Yakov Barden Applicant

Print or type name of applicant:

s/ Yakov Barden,

Address: *Tri-City Crisis*
Lynn

Appendix D

Capacity of Applicant (underline):

Licensed Physician, Police Officer,
Qualified Physician.

Date *9/06/89* 19__

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* The Definition of "likehood of serious harm" which in association with mental illness justifies involuntary retention in a mental health or retardation facility is as follows (G.L. 123 Sect. 1):

> (1) "Substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm;
>
> (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or
>
> (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgement is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community."

APPENDIX E — STATE CIVIL COMMITMENT STATUTES AUTHORIZING SEIZURE PURSUANT TO CERTIFICATION BY MENTAL HEALTH PROFESSIONALS

ALASKA STAT. § 47.30.705 (1995);

ARIZ. REV. STAT. ANN. § 36-524 (1993);

CAL. WELFARE AND INSTITUTIONS CODE § 5150 (West 1984);

COLO. REV. STAT. ANN. § 27-10-105 (West 1990);

CONN. GEN. STAT. ANN. § 17a-502 (West 1992);

FLA. STAT. ANN. § 394.463 (West 1993);

GA. CODE ANN. § 37-3-41 (1995);

ILL. ANN. STAT. ch. 405, paras. 5/3-601, 5/3-602, 5/3-605 (Smith-Hurd 1993);

LA. REV. STAT. ANN. § 28:53 (West 1989);

MD. CODE ANN., HEALTH-GENERAL § 10-622 (1994);

MICH. COMP. LAWS ANN. §§ 330.1423, .1425, .1427 (West 1992);

NEB. REV. STAT. §§ 83-1024, 1026, 1028 (1995);

NEV. REV. STAT. §§ 433A.150, .160 (1991);

N.M. STAT. ANN. § 43-1-10 (Michie 1993);

Appendix E

N.Y. MENTAL HYGIENE LAW § 9.27 (McKinney 1996);

N.D. CENT. CODE § 25-03.1-25 (1995);

OR. REV. STAT. ANN. § 426.233 (1993);

PA. STAT. ANN. tit. 50, § 7302 (Cum. Supp. 1995);

R.I. GEN. LAWS § 40.1-5-7 (1990);

S.C. CODE ANN. § 44-17-410 (Law Co-op. 1985 & Supp. 1995); S.D. CODIFIED LAWS ANN. § 27A-10-1, 10-2 (1992);

UTAH CODE ANN. § 62A-12-232 (1993);

VT. STAT. ANN. tit. 18, § 7504 (1987);

WASH. REV. CODE ANN. § 71.05.160 (West 1992);

W. VA. CODE § 27-5-2 (1992).

MOTION FILED
JUN 2 6 1996

(2)

No. 95-1929

In The

Supreme Court of the United States

October Term, 1995

MARY McCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,

Petitioner,

v.

THE CITY OF LYNN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION

The Mental Health Legal Advisors Committee, the Bazelon Center for Mental Health Law, and Commission on Law and Social Action of the American Jewish Congress, New England Region, move for leave to file the accompanying brief *amicus curiae* in support of Mary McCabe's petition for a writ of certiorari from the judgment and opinion of the United States Court of Appeals for the First Circuit.

Pursuant to Supreme Court Rule 37.2, consent of the parties to the filing of the brief was sought through counsel. Counsel for the petitioner gave consent, but counsel for the respondent City of Lynn declined to give consent.

INTEREST OF AMICI

The first two listed organizations seeking to file this brief *amicus curiae* have experience with Fourth Amendment issues in general, and, in particular, with the special legal problems of individuals who have been diagnosed with, or are perceived to have, mental illness. Resolution of this case will directly affect the clients and staff of these organizations, and the attorneys who depend on them for assistance. The third listed organization has a long history of working to protect the civil and human rights of all.

The Mental Health Legal Advisors Committee (MHLAC) is a statutory agency of the Commonwealth of Massachusetts, operating under the jurisdiction of the Supreme Judicial Court and with the explicit "duty . . . to assist and advise indigent patients and residents in . . . mental health . . . facilities of the commonwealth." Mass. Gen. L. ch. 221, § 34E. In that capacity, it provides advice and assistance to individuals with mental illness throughout Massachusetts, to their families and friends, and to other attorneys. MHLAC also has "the duty . . . to conduct a continuing program of information with regard to the legal rights of patients and residents at all mental health . . . facilities in the commonwealth," *id.*, and, accordingly, writes, publishes, and distributes pamphlets, handbooks, and a semi-annual legal journal, and provides training, to judges, lawyers, legislators, individuals, organizations, and the staffs of mental health facilities. As an aspect of these obligations, MHLAC acts to monitor legal issues, especially those involving human rights, affecting Massachusetts citizens who are caught up in the state's mental health system.

With over 2,000 requests for assistance annually logged at MHLAC, its attorneys regularly assist individuals (or their attorneys) who have been involuntarily committed pursuant to Mass. Gen. L. ch. 123, § 12 or who are threatened by such a commitment. As a consequence, much of their effort, in their roles both as advocates and as monitors, is directed at the numerous issues surrounding the commitment process.[1] This litigation will therefore have a direct impact both on the individuals whom

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[1] *See, e.g., D.L. v. Commissioner of Social Services*, 412 Mass. 558, 559 n.3 (1992); *Taunton State Hospital v. LaPlante*, 40 Mass. App.Ct. 1124 (1996), *application for review pending*, No.

MHLAC serves and on the MHLAC advocates who attempt to provide assistance to this client group.

The Bazelon Center for Mental Health Law (the Bazelon Center) is a Washington, D.C.-based public interest organization founded in 1972 to advocate for the rights of children and adults with mental illness. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and has participated as *amicus curiae* in this Court in more than a dozen additional cases. Its advocates devote considerable time to commitment issues; this includes responding to numerous inquiries from individuals about commitment proceedings, systemic reform efforts geared towards deinstitutionalization of individuals committed to state facilities, and work on cases directed at correcting abuses in the commitment process.

The American Jewish Congress (the AJCongress) is an organization committed to the principle that the destinies of all Americans are indissolubly linked and that any act which unjustly injures one group necessarily injures all. Out of this firmly held belief, the AJCongress created its Commission on Law and Social Action in 1945, in part "to fight every manifestation of racism and to promote the civil and political equality of all minorities in America."

Believing that Jewish interests are inseparable from the interests of justice, the AJCongress cannot remain

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FAR-08564 (Mass. Supreme Judicial Court, filed June 14, 1996); *see also* Jennifer Honig, *An Unexpected Admission*, 44 ADVISOR 1 (Spring 1996).

impassive or disinterested when persecution, discrimination, or humiliation is inflicted upon any human being because of his or her race, religion, color, national origin, gender, or ancestry. The persecution at any time of any minority portends the shape and intensity of persecution of all minorities. The same broad principles apply to persons alleged to be mentally ill.

Furthermore, the special concern of the Jewish people for human rights derives from an immemorial tradition which proclaims the common origin and end of all mankind and affirms, under the highest sanction of faith and human aspirations, the common and inalienable rights of all persons. The struggle for human dignity and liberty is thus of the very substance of the Jewish tradition. And the sanctity of the home against arbitrary lawless intrusion is fundamental to that tradition's concepts of human dignity and liberty.

REASONS FOR GRANTING THE MOTION

This case claims a violation of the Fourth Amendment's prohibition against the warrantless entry and search of a private residence in a civil matter. The estate of the individual who died when the respondent City of Lynn's police served an involuntary commitment order signed by a physician seeks damages pursuant to 42 U.S.C. § 1983. Although the *amici* have no doubt that the petitioner and her counsel will continue vigorously and effectively to pursue this matter, the Court should grant this motion and order the brief *amicus curiae* to be filed in order to obtain the experience and broader perspective which these organizations bring to the matter.

As the previous section discusses, *amici* are intimately and regularly involved with the specific and general issues raised by this case. They frequently advise or refer individuals who are subject to involuntary commitment orders and who are consequently seized and incarcerated without benefit of a warrant. The events which led to this case, especially the death of Rose Zinger, graphically demonstrate the perils of that course of events. The extreme nature of the result in this instance, however, should not belie the fact that, as the brief *amicus curiae* demonstrates, there is a compelling need for a warrant requirement in involuntary commitments regardless of the harm occasioned in a particular case.

The accompanying brief shows that the situation described in the petition, while especially tragic in its outcome, depicts a result which should be wholly expected when the discretion to order enforcement of an involuntary civil commitment rests solely with medical personnel. Accordingly, the Mental Health Legal Advisors Committee, the Bazelon Center for Mental Health Law, and Commission on Law and Social Action of the American Jewish Congress, New England Region, request that the Court grant this motion to file their brief in support of the petition for certiorari.

Respectfully submitted,

GILL DEFORD
JENNIFER HONIG

June 1996

No. 95-1929

In The

Supreme Court of the United States

October Term, 1995

MARY McCABE, as Administratrix of
the Estate of Ruchla "Rose" Zinger,

Petitioner,

v.

THE CITY OF LYNN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF *AMICUS CURIAE* OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION

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INTEREST OF AMICI

The interest of *amici* is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

In many instances involving involuntary commitments, individuals are subjected to humiliating and improper search, apprehension, and incarceration, but the harm is not so apparent or egregious that the legal system is able to, or could be expected to, provide a remedy after the fact. Furthermore, there is little or no chance of effecting the equitable remedy of release prior to the end of the temporary commitment. As a consequence, most individuals who are victimized by involuntary commitments have no practical legal recourse.[1] This case is unusual, therefore, because the harm was so extreme and obvious, and the municipal policy which led to that harm so clearly set out, that the legal system could provide a remedy, and, accordingly, there were attorneys willing to represent the victim.

The critical point for purposes of this petition, though, is that involuntary commitments frequently implicate civil rights violations, and the lack of a warrant requirement increases the likelihood of those violations. This case, while thus unusual in the extremity of the physical harm and in the opportunity to seek restitution for that harm, is not unusual in the nature of the rights

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[1] *See* Lynne Valenti, *Section 12 Admissions – The Problem with Remedies*, 41 ADVISOR 7 (Fall 1994).

violated, as the examples presented later in this brief (at 10-17) will show. In this larger context, the case is significant for its ability to demonstrate the defects in a system which allows search, seizure, and incarceration without a warrant.

In order to ensure that other instances of Fourth Amendment violations are not evaded, therefore, the Court should grant this petition. It goes without saying that the death of Rose Zinger was a tragedy that should never be repeated. By reviewing and reversing the decision of the Court of Appeals, however, this Court will not only decrease the likelihood of physical harm in future involuntary commitments, but will also help to prevent all violations of the Fourth Amendment occasioned in the involuntary commitment context – regardless of the nature of the harm.

I. THE FIRST CIRCUIT'S "ADMINISTRATIVE PURPOSES" ANALYSIS EVISCERATES THE FOURTH AMENDMENT'S WARRANT REQUIREMENT FOR INDIVIDUALS SUBJECT TO CIVIL COMMITMENT

Relying on key decisions of this Court, the court below purports to recognize the critical protections guaranteed by the Fourth Amendment:

> Nonconsensual entries by government agents into a residence without a warrant are presumptively "unreasonable" under the Fourth Amendment. . . . This presumption is designed to safeguard the special privacy expectations traditionally recognized in the American home by requiring that a "neutral" and detached judicial

> officer make an independent assessment as to whether law enforcement agents have probable cause to effect an intended search or arrest within the home.

McCabe v. Life-Line Ambulance Service, Inc., 77 F.3d 540, 544 (1st Cir. 1996) (Pet. 9a) (citations omitted). Despite this recognition, however, the First Circuit concludes that the Fourth Amendment is not violated when police officers invade a private home based solely on the signature of a doctor or nurse who has neither conducted an examination of the individual to be committed nor held a hearing to evaluate the evidence.

The appellate court's leap from the basics of Fourth Amendment jurisprudence to its extraordinary conclusion is explicitly *not* premised on the one recognized exception to the warrant requirement for a residential search, the existence of exigent or emergency circumstances. *Id.* at 546 (Pet. 13a). Rather, the court below relies on a line of decisions which, in carefully limited and discrete circumstances, obviate the need for a warrant when the search is "conducted in furtherance of an important administrative or regulatory purpose, or 'special need,' which would be undermined *systemically* by an impracticable warrant or probable-cause requirement." *Id.* at 545 (Pet. 10a), quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Consequently, according to the Court of Appeals, the specific events of this case – breaking down a residential door, forced entry into the home of a terrified survivor of the Holocaust, the handcuffing and

violent removal of the individual, and her consequent death[2] – are all irrelevant: "[A] 'special need' search procedure policy . . . must focus not on the particular case but on the essential systemic attributes of the search procedure itself . . . . " *McCabe*, 77 F.3d at 549 (Pet. 21a).

The First Circuit's reliance on this Court's "administrative purpose" or "special need" decisions is a significant departure from the premises of those decisions, ignores or understates their markedly different circumstances, and represents a drastic diminution in the Fourth Amendment's guarantee of residential privacy. That line of authority has several variations, but none can be stretched to cover this situation. Thus, this is not comparable to a social worker's home visitation on which eligibility for welfare is premised and which the recipient may simply refuse, a condition which negates any Fourth Amendment implications or protections. *Wyman v. James*, 400 U.S. 309, 317 (1971). Nor is it a search outside the home, where the expectations of privacy are considerably reduced. *See O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (search of public employee's desk); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (search of student's pocketbook on school grounds).

In its most dramatic departure from this Court's jurisprudence, however, the First Circuit purports to deduce support from the determination that warrantless home entry is permissible in the administration of a probation system. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

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[2] *See McCabe v. City of Lynn*, 875 F.Supp. 53, 57 (D.Mass. 1995) (Pet. 41a-42a), *rev'd sub nom. McCabe v. Life-Line Ambulance Service, Inc.*, 77 F.3d 540, 542-543 n.2 (1st Cir. 1996) (Pet. 4a-5a).

This analysis represents a basic misperception of the two situations. The critical premise of *Griffin*, as the First Circuit itself has previously recognized, is that "probation, as 'a form of criminal sanction,' disenfranchises the recipient of at least some rights enjoyed by law-abiding citizens, probation being 'simply one point . . . on a continuum of possible punishments . . . . ' " *United States v. Cardona*, 903 F.2d 60, 62 (1st Cir. 1990) (applying *Griffin* to administration of a parole system), *cert. denied*, 498 U.S. 1049 (1991), quoting *Griffin*, 483 U.S. at 874. Although the court below relies throughout on both *Griffin* and *Cardona* for its explication of the administrative purpose doctrine, and explicitly recognizes that this case raises Fourth Amendment issues in a civil setting, *see* 77 F.3d at 544 (Pet. 8a), it makes no attempt to explain how *Griffin* could apply in the civil commitment context where the determinative "criminal sanction" is lacking.[3]

Thus, in the absence of an emergency, this Court has countenanced the nonconsensual search of a home in only one situation, which was expressly premised on the ongoing loss of rights occasioned by a criminal conviction and punishment. The decision below thus dramatically

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[3] A telling omission follows the First Circuit's observation that "warrantless 'special need' searches have been condoned by the courts in circumstances where the State interests were far less compelling and urgent [than in the present situation]." 77 F.3d at 547 (Pet. 14a). The court below then describes three decisions of this Court, all of which approved warrantless searches carried out under the administrative purpose rubric – but in the non-residential context. The First Circuit does not mention *Griffin* in this discussion.

deviates from this Court's narrow exception to the prohibition against warrantless searches of private residences.

II. THE COURT OF APPEALS' DETERMINED RELIANCE ON CLINICIANS NOT ONLY MISCONSTRUES THE STATUTE, BUT, MORE IMPORTANTLY, MISUNDERSTANDS THE INSTITUTIONAL INADEQUACIES OF MEDICAL PERSONNEL IN ISSUING THE EQUIVALENT OF SEARCH WARRANTS

The reliance of the court below on the administrative purpose exception to the warrant requirement depends on two complementary assumptions: an uncritical acceptance of medical personnel as substitutes for judges, and a decidedly tepid faith in the actions of magistrates. On the latter point, the court states:

> More importantly by far, . . . the additional burdens imposed . . . by a universal warrant requirement in category 2 searches seem to us "undue" and "unreasonable" when viewed in relation to *the minimal additional protection afforded by a requirement that a pink paper be screened by a magistrate before it is executed.*

77 F.3d at 550 (Pet. 22a) (emphasis added). Similarly, in its rush to reject judicial review, the court both misconstrues the statutory scheme and ignores the fact that clinicians, by the nature of their training, practice, and ethical obligations, are not appropriate surrogates for magistrates.

A. The First Circuit misreads critical components of the involuntary commitment scheme.

As an initial matter, the appellate court misunderstands the integrated roles of medical personnel and magistrates which the legislature intended. The statute expressly contemplates that, in circumstances such as these, a judge should consider the evidence presented for involuntary commitment, and, only where appropriate, issue a warrant of apprehension, followed by a physician's examination. Mass. Gen. L. ch. 123, § 12(e) (Pet. 35a); *see McCabe v. City of Lynn*, 875 F.Supp. at 62 & n.11 (Pet. 53a). The Court of Appeals, however, inexplicably holds that, when a "pink paper" is signed pursuant to section 12(a) of Mass. Gen. L. ch. 123, the hearing and warrant requirement of section 12(e) are "implicitly" obviated. 77 F.3d at 548 (Pet. 17a). The court below thus begins its analysis by incorrectly assuming that the legislature did not intend magistrates to evaluate the propriety of enforcing commitment orders.

Secondly, in attempting to bolster its view of section 12(a) by infusing into it "reasonable safeguards" against "obvious abuse", 77 F.3d at 551 (Pet. 25a), the appellate court incorrectly states that

> a pink paper can be authorized *only by a licensed psychiatric physician* . . . whose extensive education and specialized experience and training should enable the *psychiatric physician* more reliably to parse such lay reports, especially those provided by family members, with the requisite professional skepticism.

Id. (Pet. 25a) (emphasis added; footnote omitted); *see also, e.g., id.* at 552 (Pet. 27a-28a) ("an involuntary 'category 2'

commitment rests with a licensed psychiatric physician"). In fact, the so-called "category 2" commitment order, by which an order to commit is issued without examination of the individual, may be signed by any of three clinicians: a "physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist." Mass. Gen. L. ch. 123, § 12(a) (Pet. 33a). However capable these clinicians may be, the court based its confidence in pink paper signatories on the incorrect assumption that they were "psychiatric physicians". In fact, however, they may be either physicians without psychiatric training, *see Reida v. Cape Cod Hospital*, 36 Mass.App.Ct. 553, 555-556, *review denied*, 418 Mass. 1105 (1994), or psychologists or nurses without medical degrees.

B. In evaluating the propriety of nonconsensual searches of private residences, medical personnel are not appropriate substitutes for judges.

The First Circuit's misreading of the statutory scheme, however, foreshadows a more fundamental error: its belief that a clinician evaluating the sole standard for temporary involuntary commitment – dangerousness – is a proper substitute for a magistrate balancing the factors relevant to issuing a warrant of apprehension. This assumption ignores the institutional deficiencies which medical personnel necessarily bring to the task – deficiencies related not to their dedication and intelligence, but, rather, to the inherent inadequacies and limitations of their training and viewpoint in the context of the essentially judicial duty which they are asked to perform. In addition, in many, perhaps most, instances, the medical personnel signing section 12 orders are not

government employees; therefore, they have not been charged with acting in the public interest, *see, e.g., Griffin*, 483 U.S. at 876, and are less likely to be familiar with traditional concepts of governance, such as due process.

i. Clinical training is not conducive to the balancing of interests required.

Clinicians are not prepared professionally to conduct the analysis which, as the instant case demonstrates, may result in a residential search by armed police officers. Their training directs them to review the psychiatric and medical interests of their clients, but not other personal concerns. In recent research presented at the Third Annual Conference on State Mental Health Agency Services Research and published by the National Association of State Mental Health Program Directors Research Institute, Inc., the clinician's perspective is presented as follows:

> [P]ersons who have experienced mental illness and received various treatment modalities and providers of those services perceived the world very differently. . . . Professionals are trained to focus on pathology and incapacity and to practice mental health care as a specialized intervention. Clients, on the other hand, have a more global world-view of mental health and recovery that encompasses the need to recognize and nourish personal strengths, respect choice and autonomy, and support a quality life. This oversight is particularly salient when researching the iatrogenic effects of mental health services and institutionalization and the impact of those effects on the lives of persons diagnosed with

> mental illness. Often, researchers lack the insight to ask questions that would capture detrimental effects of treatment and care. In a review of quality of life instruments, for example, I found no measure of personal freedom and decision-making power even though these factors represent deep-seated cultural values.

Jean Campbell, *The Well-Being Project: Mental Health Clients Speak for Themselves,* THIRD ANNUAL CONFERENCE PROCEEDINGS 21, 22 (1993) (citation omitted).

As indicated above, the clinician is trained to focus on the narrow issue of the patient's health (and also, perhaps, on the safety of others), but is not necessarily concerned with the individual's interests in non-clinical factors or with the larger interest of preserving and enforcing fundamental rights. By contrast, a magistrate's background demands appreciation of the importance of individual interests in non-clinical factors and in conducting analyses that account for such interests.

An example reveals how the clinical evaluation conducted prior to the signing of a pink paper does not involve the balanced review which a magistrate would employ.[4] In June 1995, Larry, who was sixteen, and his father were touring a psychiatric hospital. Larry had emotional problems and a form of autism, but was currently living with his family and attending school. At the conclusion of the tour, a nurse asked Larry to answer some questions. When asked if he ever wanted to hurt or

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[4] The names of the individuals discussed in the following examples have been changed, but each has given permission for presentation of his or her story.

kill himself, Larry explained that, while he could imagine wanting to do so at some future point if he believed that he would never have a normal life, he did not presently desire to injure himself. The nurse consulted with a psychiatrist, who then informed Larry's father that Larry had to stay at the hospital. Despite his father's objection that the psychiatrist had not talked with his son, Larry was held at the facility. Extremely upset and agitated by this news, Larry was thrown to the ground, wrapped in a papoose-like covering, and placed in a darkened room. In reaction to this outburst, the crisis team then issued the order for admission.

In determining that Larry should be admitted, the psychiatrist apparently reviewed his clinical condition, as conveyed to him by the nurse, but did not consider Larry's personal preferences. Clinicians' evaluations for purposes of involuntary admissions will often take this narrow approach, which lacks a careful balancing of a range of public and private interests and focuses entirely on the perceived psychiatric state of the individual. It is precisely because of this narrow clinical approach that the broader perspective of the legally trained magistrate should take precedence.

ii. Influences largely peculiar to the clinician-patient relationship may incline clinicians to sign commitment orders.

A clinician's personal feelings about a patient may be a factor leading to the decision to issue an admission

order.[5] Thus, for instance, a clinician may be disturbed by the patient's attitudes or behaviors in the context of therapy. Even doctors and patients who work together for long periods of time will have disagreements in the course of treatment, which may incline the doctor in favor of signing a pink paper.

A recent example illustrates this possibility. In October 1995, Annette was experiencing wildly fluctuating blood sugar levels induced by diabetes and was unsure if she was having an anxiety attack or a heart attack. Speaking with a psychiatric nurse at her hospital's outpatient clinic, where she was well known, Annette denied being suicidal or at risk of self-injury. While Annette remained in a chair, crying from the stress of the anxiety attack which had initiated her visit to the hospital, the nurse conversed with the clinic's chief psychiatrist on the other side of a glass window. Without entering the room to speak with Annette or attempting to contact her physician, psychopharmacologist, or therapist, the chief psychiatrist issued a section 12 order.

Annette believes that this decision was driven by the chief psychiatrist's negative feelings towards her deriving from a previous disagreement over the course of her treatment. Her own psychiatrist had challenged the chief

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[5] The First Circuit offers in support of its position that "many, if not most, category 2 searches are executed pursuant to pink papers issued by the subject-patient's current or former psychiatric physician." 77 F.3d at 553 n.13 (Pet. 29a). There is no evidence for this statement. In any event, the argument is ironic, because, as the following discussion indicates, the clinician-patient relationship may actually prejudice the clinician in favor of commitment.

psychiatrist by confronting him and criticizing his earlier decision. When she and the chief psychiatrist did speak after the section 12 order was signed, Annette could sense his hostility; riding the elevator with him to the locked ward, he told her that, if she did not go quietly, he would put her in four-point restraint.

In addition, clinicians have professional liability concerns which influence their actions. In marginal cases, these fears may induce a clinician to issue an order for admission, as apparently happened in the following recent instance.

In April 1996, Mishi went to see her neurologist for a brief visit. To the neurologist's inquiry about her depression, Mishi replied that she was doing no better and no worse than before. With no further discussion, the neurologist then stated that she was arranging for Mishi to have an evaluation at a nearby private hospital. The neurologist telephoned the hospital, stating that Mishi was on the way, that she would likely deny everything, and that they should hold her for an evaluation. At the hospital, Mishi provided a nurse details about past experiences; the nurse did not ask about Mishi's present condition. Mishi was then told that she would have to stay at the hospital for the night and that, if she tried to leave, she would be forcibly held. Over the course of the night, Mishi explained to four doctors that she was not experiencing any problem and that there was no reason to detain her. In the morning, she was released.

In this case, a series of clinicians, including Mishi's neurologist, the nurse, and several doctors were all reluctant, even absent any evidence of present danger, to

release her. The logical inference is that no one individual would take responsibility for her, thus forcing her to gain her freedom only by convincing six different individuals that there was no basis for incarceration.

While emotional and liability concerns are often at the forefront of a clinician's thoughts when making an admissions decision, a magistrate would not be subject to these influences. It is unlikely that a magistrate would have had an interaction with, and formed a personal opinion of, the subject of the proposed order. Additionally, magistrates are free of the liability concerns that burden clinicians. They are thus far better situated to conduct a neutral analysis of the need for an emergency commitment.

iii. The evaluation preceding a commitment order is often based on faulty information.

Because of the legal standard, the determination of whether a person is involuntarily committed will frequently be based upon information which is insufficient, unreliable, or both. The statutory language is vague, allowing clinicians considerable interpretive latitude; moreover, it does not require either a clinical evaluation or even a conversation with the subject of the commitment order.

A clinician may order admission to a psychiatric facility if he or she has "reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness." Mass. Gen. L. ch. 123, § 12(a) (Pet. 33a). Thus, the critical threshold is simply *any* basis for the belief that failure to hospitalize

would create a likelihood of serious harm. The statute does not require the clinician either to consider all available information or even to attempt to confirm his or her belief. The frequent result is needless hospitalization based upon a partial, even misleading, picture, as the information is insufficient to portray the reality of the situation.

Two recent examples demonstrate this problem. In January 1995, upon deciding that Brenda's participation in a day treatment program should be ended, the program's psychiatrist ordered her committed. The psychiatrist and two other clinical staff had previously speculated that, upon being informed that her treatment at the program would be ending, Brenda would respond negatively and require hospitalization – but they did not inform Brenda of this theory. In fact, Brenda would have been relieved by the news that her participation in the day program was ending.

The psychiatrist apparently thought, based upon his speculation about the likely consequence of the termination, that the standard for signing a pink paper – "reason to believe" – had been met. By failing to elicit the correct information, the psychiatrist had incorrect facts on which to draw his conclusion. If Brenda had enjoyed access to even the most minimal judicial evaluation prior to the carrying out of the admission order, the staff's hypothesis could have been explored and Brenda could have offered her response.

In February 1996, a visiting psychiatrist, meeting with Deborah for the first time, concluded after ten minutes that she was depressed and admitted her to a private

psychiatric facility pursuant to a section 12 order. As Deborah explained to the hospital staff, however, the loss of two brothers in a single year had prompted her to contemplate and speak of death, while the deprivation of companionship brought on feelings of loneliness and boredom. The hospital staff quickly agreed that she was not suicidal. Thus, while the visiting psychiatrist apparently concluded that she had "reason to believe" that Deborah met the section 12 standard, a more complete review of the facts indicated otherwise.

Other language of the commitment statute further encourages decisions based upon insufficient and unreliable information. First, clinicians have broadly interpreted the terms "emergency" and "refusal . . . to consent to such examination", Mass. Gen. L. ch. 123, § 12(a) (Pet. 33a), to encompass a wide range of situations. But some situations are clearly not urgent, and some refusals of examination do not constitute a formal request and response.

For example, the December 1995 morning before Susan's appointment with a new psychiatrist had been eventful and stressful, in part due to the houseful of workers whom she was supervising; with a tremor in her voice, she called to reschedule. The psychiatrist signed a section 12 order, and directed the police to bring her in. After they entered Susan's house uninvited through an unlatched screen door and informed her that she was going to the hospital, Susan went willingly, initially believing that a family member had been involved in an accident.

By signing the pink paper, the psychiatrist must have concluded that an emergency existed. Susan had been referred to her to address possible psychiatric causes of difficulties in eating and sleeping. Earlier in the month, Susan had explained that to the psychiatrist's associate, a social worker, and had also clearly stated that she was not suicidal. While Susan's voice may have trembled on the telephone, that fact and the request to postpone do not reveal the existence of a present emergency. Her psychiatrist had taken a liberal interpretation of the term "emergency".

Secondly, a clinician's right to sign a commitment order without an evaluation and solely "on the basis of the facts and circumstances", Mass. Gen. L. ch. 123, § 12(a) (Pet. 33a), creates an obvious opportunity for mistakes and abuse. As demonstrated by the instant case, *see* 77 F.3d at 542 (Pet. 3a-4a), and by Annette's story, the clinician signing the commitment order may never speak with the subject of the order, but instead relies solely on second-hand information. And, the lack of a personal evaluation eliminates the patient's ability to confirm or dispute the facts and circumstances supporting the conclusion of likelihood of harm. For example, in Susan's case, the psychiatrist never discussed her condition with Susan, but, presumably, only spoke with the social worker. If the psychiatrist had spoken with Susan prior to instructing the police to bring her in, she might have learned that Susan did not pose a likelihood of harm. She might also have learned that Susan postponed her appointment in part because she hesitated to leave the workers alone in her house.

The issue of this case is whether the Fourth Amendment permits the warrantless search of a residence solely on the signature of a clinician. The examples presented in this brief are not intended to illustrate the inadequacies of the Massachusetts involuntary commitment scheme, but, rather, to show why a clinician's signing of a pink paper is not sufficient to meet the Fourth Amendment's prohibition against unreasonable search and seizure. In the absence of the detached perspective provided by a legally trained magistrate, section 12 orders must inevitably lead not only to improper commitments, but also to armed police entering a private dwelling without a warrant.

Rose Zinger died not because of a section 12 order, but as a result of such a forced entry. The above examples demonstrate why an intrusion of that nature should not flow automatically from a clinician's decision to sign a pink paper.

CONCLUSION

For the reasons stated in this and in the brief for the petitioner, the Court should grant the petition for review.

Respectfully submitted,

GILL DEFORD
JENNIFER HONIG

June 1996

Supreme Court, U.S.
FILED
JUN 28 1996
CLERK

(3)

No. 95-1929

In the
Supreme Court of the United States
OCTOBER TERM, 1995

MARY McCABE, AS ADMINISTRATRIX
OF THE ESTATE OF RUCHLA "ROSE" ZINGER,
Petitioner,

v.

THE CITY OF LYNN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 95-1929

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STATEMENT OF THE CASE.

A. *Limit of Petitioner's Claim Below*

This is a civil rights action under 42 U.S.C. § 1983 brought in the United States District Court for the District of Massachusetts by the Petitioner, Mary McCabe ("McCabe") (the plaintiff below), as administratrix of the Estate of Ruchla "Rose" Zinger, against the Respondent, City of Lynn, Massachusetts ("City"). (A. A at 5a).[1]

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[1] References herein to the opinion of the United States Court of Appeals for the First Circuit are "A. A" and to the decision of the United States District Court for the District of Massachusetts are "A. B", respectively, of the petition Appendix.

McCabe claimed that the City Police Department maintained a policy violative of the Fourth Amendment in permitting police officers to forcibly enter residences without a judicial warrant, and in the absence of exigent circumstances, in execution of so-called "pink papers," orders issued by a psychiatrist pursuant to Massachusetts General Laws, c. 123, § 12(a) for the involuntary temporary hospitalization of dangerous mentally ill persons. (A. A at 5a-6a). McCabe claimed that this policy caused a violation of Ms. Zinger's "Fourth Amendment right to be free from unreasonable searches" when, on September 7, 1989, Lynn police officers forcibly entered Ms. Zinger's apartment without a warrant in execution of a § 12(a) pink paper for the emergency temporary hospitalization of Ms. Zinger as a dangerous mentally ill person. (A. A at 6a).[2]

The district court granted summary judgment for McCabe. Upon the City's appeal the United States Court of Appeals for the First Circuit reversed and remanded holding that the City was entitled to summary judgment as the challenged policy comports with the "special needs" exception to the Fourth Amendment warrant requirement. (A. A at 32a).

B. *Relevant Statutory Provisions*

Chapter 123 of Massachusetts General Laws provides a comprehensive scheme for administering to mentally ill persons.

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[2] It is to be noted, as did the First Circuit:

> The only constitutional violation McCabe attributes to the City is the forcible warrantless entry.

(A. A at 5a, n.2).

> We point out again, however, that McCabe presently challenges only the alleged infringement of Ms. Zinger's Fourth Amendment right to be free from unreasonable governmental entries to her residence, *see supra* note 2, and does not allege an infringement of her liberty interest to be free from any unreasonable governmental restraint attending the subsequent seizure of her person.

(A. A at 6a, *see also infra* n.4).

Section 12(a) thereof makes provision for the emergency restraint and temporary involuntary hospitalization of dangerous mentally ill persons. In particular, § 12(a) includes provision for the involuntary hospitalization of recalcitrant and dangerous mentally ill persons. It provides that:

> in an "emergency situation," a qualified physician . . . may sign a pink paper, even when the alleged mentally ill person refuses to submit to a medical examination, if the "facts and circumstances" suggest that the person would create a "likelihood of serious harm".

(A. A at 16a).[3] Section 1 (second clause) of ch. 123, defines "likelihood of serious harm" as:

> a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them.

(A. A at 18a) (A. C at 60a).

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[3] First Circuit parsing § 12(a). This provision is referred to by the First Circuit as a "category 2" commitment procedure, *see* A. A at 16a-17a.

C. *Limit of Petitioner's Claim Before This Court – Matters Not Questioned.*

(1) Petitioner Does Not Question the Interpretation by the Court Below of Relevant State Statutes.

The First Circuit made four specific findings respecting the State's statutory scheme, *none of which are challenged here*:[4]

(a) The legitimacy of the State's *parens patriae* and "police power" interests in ensuring that "dangerous" mentally ill persons not harm themselves or others is beyond dispute.

(A. A at 14a).

(b) Where a pink paper issues for a recalcitrant and dangerous mentally ill person pursuant to § 12(a),

the statute implicitly authorizes warrantless searches and seizures.

(A. A at 17a).

(c) The statutory definition of "likelihood of serious harm"

prescribes a sufficiently clear and reasonably reliable administrative standard for ensuring that involuntary commitments are limited to imminently "dangerous" mentally ill persons in emergent circumstances.

(A. A at 19a).

[4]The petitioner's posture before this Court appears to be that the First Circuit was in error in finding that warrantless entry in the service of a "category 2" pink paper [emergency temporary commitment of a recalcitrant and dangerous mentally ill person] is within the "special needs" exception to the warrant requirement, not that the First Circuit erred in its statutory interpretations and assessments.

> (d) [T]he specific focus and overall context of the Massachusetts statute implicitly circumscribe the category 2 search procedure within narrow bounds. A police officer is permitted to enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person pursuant to a duly issued pink paper, but may not engage in a generalized search.

(A. A at 19a).

(2) Petitioner Does Not Question the Historical Facts.

McCabe does not dispute that it was pursuant to this statutory scheme that Dr. Yakov Barden, a licensed psychiatrist qualified under § 12(a), issued the pink paper order for the emergency hospitalization of Ms. Zinger. (A. A at 4a). The pink paper (1) expressly referenced its statutory authority, § 12, (2) provided a definition of "likelihood of serious harm" taken verbatim from § 1 of ch. 123 (A. D at 66a) (A. A at 16a), and (3) included Dr. Barden's expert opinion that Ms. Zinger "requires hospitalization to avoid the likelihood of serious harm by reason of mental illness." *Id.* The pink paper prominently contained Dr. Barden's description of Ms. Zinger as *presently* dangerous:

> [Patient] has a [history] of mental illness and she was hospitalized at Danvers [State] Hospital couple of years ago. [Patient] is very angry and hostile; she is very impulsive and explosive. She made threats to harm her ex-husband. [Patient] is dangerous to others.

(A. D at 64a) (A. A at 17a-18a).[5]

[5] In a further indication of Ms. Zinger's dangerousness, Dr. Barden prescribed: "May restrain PRN [as necessary]". (A. D at 65a).

The First Circuit found as undisputed background facts that "Ms. Zinger, a 64-year-old Lynn, Massachusetts resident with a history of mental illness and psychiatric hospitalization, as well as severe obesity and high blood pressure, resisted all attempts at communication and intervention by family members. She refused to be examined by a doctor after threatening her former husband with physical harm and upsetting her downstairs neighbors by causing loud and violent disturbances in her apartment." (A. A at 3a). McCabe does not dispute, nor did she below, that Ms. Zinger was a recalcitrant and dangerous mentally ill person, who was, as described in the pink paper, "very angry and hostile" and "very impulsive and explosive."

In short, McCabe does not dispute the statutory scheme as interpreted, that there was State procedural compliance, that Ms. Zinger was in fact a proper subject for emergency commitment under § 12(a), or that the pink paper on its face sufficiently showed Ms. Zinger was mentally ill and imminently dangerous.[6]

(3) Petition's Claim.

McCabe claims, that irrespective of the above factors, the Fourth Amendment required a judicial warrant — that the First Circuit "creat[ed] a new and unprecedented exception" allowing

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[6] Certainly Ms. Zinger had more than her share of tragedy. There is no question that the injuries and death of Ms. Zinger were tragic and regretted by all parties in this matter. Ms. Zinger was a Holocaust survivor. (A. A at 3a) (Pet. Cert. at 2). The district court stated, as the first sentence of its Memorandum and Decision granting McCabe summary judgment:

> This case involves Rose Zinger who survived the Holocaust only to die at the hands of the Lynn Police.

(A. B at 38a). With due respect to this Court, and to the district court, this memorial appears at least inappropriate in juxtaposing the officers of the Lynn Police Department, and any policy to render aid, with the Nazis of World War II Germany.

forcible warrantless entry into the home of a law-abiding citizen. (*See* Question Presented, Pet. Cert. at *i*).[7] Her position is that a warrant was required absent that type of "exigent circumstance" that turns on the executing officers' *ad hoc*, on-the-scene, personal assessment of emergency. (A. A at 13a). Her position is that despite a holistic administrative procedure that reasonably ensures accurate identification of "imminently 'dangerous' mentally ill persons in emergent circumstances" (A. A at 19a, *see infra* at p.4), the State may not allow its officers to rely on an expert psychiatric certification of the present existence of a medical-psychiatric emergency. The officers must delay through judicial proceedings while the danger threatens.

REASONS FOR NOT GRANTING THE WRIT

I. The Decision Below Is a Proper Application of the "Special Needs" Exception to the Warrant Requirement of the Fourth Amendment.

Rather than creating a new exception, as McCabe contends (Question Presented, Pet. Cert. at *i*), the First Circuit recognized an application of the established " 'special need' exception to the warrant requirement in the particular setting presented in this case." (A. A at 31a). This Court has repeatedly instructed, as most recently in *Vernonia School District* v. *Acton*, ___ U.S. ___, 115 S.Ct. 2386 (1995):

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[7] Of course the First Circuit did not create a new exception to the warrant requirement. A "special needs" exception to the warrant requirement has long been identified by this Court. (*See* Reason I above for Not Granting the Writ).

It appears that McCabe raises a second issue. In the body of her petition she says that the First Circuit "rejected any need for a showing of probable cause." (Pet. Cert. at 10). Assuming, without conceding, that the Question Presented contains this issue (Sup. Ct. R. 14(a)), the City responds, *infra*, *see* Reasons II (p. 13) and III (p. 15) for Not Granting the Writ.

> As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." . . . [W]hether a particular search meets the reasonableness standard " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when *special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

Id. at 2390-91 (citations omitted) (emphasis added).

The First Circuit followed this guidance precisely, and carefully balanced the individual and governmental interest at stake. The First Circuit found the State interests in "prompt detention of recalcitrant and 'dangerous' mentally ill persons who require immediate temporary commitment" (A. A at 15a) to be compelling and urgent, and that delay could be critical.[8]

[8] The court stated (A. A at 14a):

> The potential consequences attending a delayed commitment — both to the mentally ill subject and others — may be extremely serious, sometimes including death or bodily injury. Thus, we think it is especially significant to the present analysis that warrantless 'special need' searches have been condoned by the courts in circumstances where the State interests were far less compelling and urgent.

In balance, the court found that a "universal warrant requirement [in this context is] 'undue' and 'unreasonable' when viewed in relation to the minimal additional protection afforded by a requirement that a pink paper be screened by a magistrate before it is executed." (A. A at 22a).[9] Perhaps the essence of the First Circuit's ruling is stated in the court's following language:

> Compliance with a warrant requirement in the context of these temporary, involuntary commitments for medical-psychiatric examination would entail critical delays in safeguarding the mentally ill person, and others, without affording commensurate privacy protections to the subject. Category 2 searches foster important governmental interests largely because the inherent imprecision in predicting the timing of any outbreak of "dangerousness" on the part of the recalcitrant, mentally ill person, inevitably means that the time spent securing judicial approval of a pink paper represents a potentially dangerous delay of *incalculable* proportion.

(A. A at 20a) (emphasis in original) (citation omitted).

McCabe claims that the First Circuit violated *Payton* v. *New York*, 445 U.S. 573 (1980), through "unjustified deviation" from precedents of this Court. (Pet. Cert. at 9).[10] McCabe's

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[9] The First Circuit was properly concerned, as in this context of need for prompt response to medical-psychiatric emergency, that "rigid adherence to a warrant requirement reaches its most suspect extreme where a judicial officer lacks the innate expertise to assess the soundness of the basic ground upon which the warrant request is predicated." (A. A at 22a-23a).

[10] McCabe says the following cases are inconsistent with the First Circuit's holding: *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987) (probation officer's warrantless search of probationer's home not violative of Fourth Amendment); *O'Connor* v. *Ortega*, 480 U.S. 709 (1987) (warrantless search of government employee's work space not violative of Fourth Amendment); *New Jersey* v. *T.L.O.*, 469 U.S. 325

claim is unfounded. Her argument is narrowly fact-specific, failing to recognize the broader underlying concepts of the case law: *i.e.*, reasonableness as the "ultimate" command of the Fourth Amendment, *Camara, infra* n.10, at 539, *see Soldal* v. *Cook County, Ill.*, 506 U.S. 56, 71 (1992); "What is reasonable depends on the context within which a search takes place." *T.L.O, infra* n.10, at 337; "careful balancing of governmental and private interest," *T.L.O* at 341; and, common sense and practicality as dictating a need for "special needs."

Additionally, McCabe overstates. For example, McCabe says that *Wyman* v. *James, infra* n.10, is inapposite because this Court reasoned in *Wyman* that if consent to a welfare visit is withheld, "there is no entry of the home and there is no search." (Pet. Cert. at 9, quoting *Wyman* at 317). But McCabe fails to note that this Court went on to say:

> If, however, we were to assume that a caseworker's home visit . . . [because consent is coerced and the interview is searching] does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard. . . . [T]he specific content and incidents of this right must be shaped by the context in which it is asserted.

Wyman, supra at 318 (citations and internal quotes omitted).

(1985) (warrantless in-school search of students' personal property not violative of Fourth Amendment); *Wyman* v. *James*, 400 U.S. 309 (1971) (social worker's warrantless visit to welfare recipient's home not violative of Fourth Amendment); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) (warrantless housing inspection violative of Fourth Amendment). (Pet. Cert. at 9-10).

In yet a further overstatement, McCabe says categorically: "in the context of administrative searches this case is squarely governed by the *Camara* case, which expressly held that a warrant is required to compel entry to the home." (Pet. Cert. at 10). But McCabe fails to note the criminal context of *Camara*. In addition, McCabe fails to note that in *Wyman* this Court distinguished *Camara* on that very basis. "[*Camara* is] not inconsistent with our result here. . . . [T]he facts . . . are significantly different from those before us." *Wyman* at 324-25. The Court specifically noted that the welfare recipient in *Wyman* was not subject to criminal prosecution for refusal to allow the home visit, *id.* at 323, whereas *Camara* "arose in a criminal context where a genuine search was denied and prosecution followed." *Wyman* at 325. The context of the instant case is in no way criminal, a fact duly noted and considered by the First Circuit. (A. A at 27a). Accordingly, *Camara* is not the categorical authority that McCabe represents.

In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court held that a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest was violative of the Fourth Amendment. It is true, as McCabe quotes, that in *Payton* the Court stated, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590. But McCabe relies on *Payton* to draw an absolute line which McCabe says the First Circuit crossed. (Pet. Cert. at 5). This Court has cautioned against mechanical applications of the Fourth Amendment.[11]

> [This Cour[t] [has a] long established recognition that standards of reasonableness under the Fourth

[11] "[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (quotation and citation omitted).

> Amendment are not susceptible of Procrustean application; [e]ach case is to be decided on its own facts and circumstances; the limitations imposed by the Fourth Amendment . . . have to be developed in the concrete factual circumstances of individual cases.

Ornelas v. *United States*, ___ U.S. ___, 116 S.Ct. 1657, 1661 (1996) (citations and internal quotation marks omitted).

It is critical to observe that *Payton* specifically involved criminal wrongdoing, with criminal consequences to the results of the search:

> Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant. . . . But a warrant is not required to establish the reasonableness of all governmental searches [as in] special needs beyond the normal need for law enforcement. . . .

Vernonia School District, *supra* at 115 S.Ct. 2390-91. Additionally, there was no special need in *Payton*.[12] Clearly, as the First Circuit concluded, this case presents such a special need.[13]

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[12] Unlike the instant case, where the need for detention of recalcitrant and dangerous mentally ill persons in emergent circumstances renders the warrant requirement impractical, the issue of "the practical consequences of a warrant requirement" in *Payton* at 602, was viewed "with skepticism." *Id.*

[13] The First Circuit was particularly careful to set the bounds of its ruling, cautioning in its Conclusion that the "special need" balancing procedure is "designedly fact-specific and must be calibrated anew in assessing the reasonableness of each administrative search to which it is applied." (A. A at 31a). "We hold only that law enforcement officers in possession of a pink paper, duly issued pursuant to category 2, Mass. Gen. Laws Ann. ch. 123, § 12(a), may effect a warrantless entry of the subject's residence within a reasonable time after the pink paper issues." (A. A at 32a).

II. This Case Does Not Present In a Form Appropriate for Certiorari Review the Question of Whether a Commitment Order May Be Issued Without Probable Cause, Because: (A) The Petitioner Did Not Dispute Below That the Commitment Order Was Issued Upon Probable Cause; (B) The Court Below Did Not Rule That Probable Cause Was Unnecessary; and, In Any Event, (C) It Appears That the Court Below Was of the View That Probable Cause Is Satisfied By the Factual Circumstances of This Case.

A. *The Petitioner Did Not Dispute Below That The Commitment Order Was Issued Upon Probable Cause.*

McCabe says here that the holding below is in conflict with circuit decisions holding "that an order authorizing the seizure of a person in the context of civil commitment proceedings must be based on probable cause." (Pet. Cert. at 11). But below McCabe never disputed that the pink paper on its face satisfied both the procedural and substantive provisions of Mass. Gen. Laws Ann. ch. 123, §§ 1 and 12(a). McCabe did not dispute that the pink paper sufficiently demonstrated that Ms. Zinger "by reason of mental illness" was "dangerous."[14] Rather, McCabe argued that the City's policy of forced entries to effectuate civil commitment papers "*per se* is illegal and in

[14] McCabe had stated in her complaint that "Rose Zinger suffered from mental illness," and that Ms. Zinger's daughter "had asked mental health workers . . . to assess her mother's mental condition." (App. 1st Cir., Volume 1, p.12). Additionally, the pink paper was based "on the *reports of family members* and neighbors as to Ms. Zinger's physical and behavioral symptoms." (A. A at 4a) (emphasis added). Although in her original complaint McCabe claimed negligence against Dr. Barden, that claim was settled (A. A at 5a, n.3), and in this action against the City there was no claim that the pink paper was inadequate. In this amended complaint against the City, McCabe merely alleged, as a matter of fact, that Dr. Barden issued the pink paper. (App. 1st Cir., Volume 3, p.186, ¶ 14).

violation of the Fourth Amendment" because of the lack of a warrant. (App. 1st Cir., Volume 3, p.158).[15]

B. *The Court Below Did Not Rule That a Commitment Order May Issue Without Probable Cause.*

It appears that in an attempt to seize an issue, McCabe says that the First Circuit "rejected any need for a showing of probable cause before such orders are issued." (Pet. Cert. at 10). The First Circuit did no such thing. Indeed, the First Circuit did not specifically decide the issue. The footnote language of the court upon which McCabe relies for rejection, that "[i]t is largely irrelevant whether the 'likelihood of serious harm' criterion of Mass. Gen. Laws Ann. ch. 123, § 12(a) approximates the 'probable cause' inquiry appropriate in the search warrant context" (Pet. Cert. at 10-11, quoting A. A at 24a, n.11) is hardly a decision that it does not.[16]

C. *It Appears That the Court Below Was of the View That Probable Cause, if Required, Was Satisfied.*

Moreover, the opinion of the First Circuit demonstrates that the court was satisfied to a rather high level of certainty that the

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[15] Reflecting this argument, during the hearings on summary judgment the district court viewed the pink paper as satisfying probable cause, but believed a warrant was required:

> [T]here are two prongs to the Fourth Amendment. One is the probable cause prong and the other is the warrant prong. That [§ 12(a)] provides probable cause. It is not clear to me that that requires the dispensing of a warrant, dispensing of the warrant.

(App. 1st Cir., Volume 3, p.157). The probable cause argument that McCabe did make was that the pink paper could not serve as probable cause for an "exigent circumstances" search without a warrant because the officers "had ample time to obtain a search warrant." (A. A at 13a).

[16] It is interesting to note that language virtually identical to the Massachusetts provision of "likelihood of serious harm" and its definition in Mass. Gen. Laws ch. 123, § 1 have been held to satisfy probable cause by the very cases upon which McCabe relies for her argument that this decision is in conflict with other circuits. (*See infra* Reason III for Not Granting the Writ, commencing at p.15).

State procedures ensured, and the pink paper itself evinced, that Ms. Zinger was both mentally ill and imminently dangerous, *e.g.*:

> the procedures are reasonably designed to *ensure accurate* identification and prompt detention of recalcitrant and "dangerous" mentally ill persons who require immediate temporary commitment

(A. A at 15a) (emphasis added);

> We think that Mass. Gen. Laws ch. 123, § 12(a), in general, and the commitment order issued by Dr. Barden, in particular, were appropriately suited to these legitimate purposes.

Id. It appears that the court was of the view that probable cause, if required, was satisfied. And as the historical facts were not disputed (*see infra* at p.5), clearly probable cause was satisfied.

With no dispute below, and no clear ruling, a serious question of the appropriateness of this case for certiorari review of the requirement of probable cause for this "special need" search is presented. Certainly, the issue is not posed in the "clear and unequivocal manner which is so necessary for proper adjudication in this Court." *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 675 (1969).

III. In Any Event, the Decision Below Does Not Conflict Substantively With Decisions of Other Circuits Respecting Probable Cause In the Context of Civil Commitment Seizures.

The decision below does not conflict substantively with any requirement of other circuits respecting probable cause for

seizure of mentally ill and dangerous persons.[17] The cases relied upon by the petitioner as presenting a conflict with this decision, while invoking the phrase "probable cause" recognize that reasonableness is its premise. They apply no higher standard of reasonableness than does the instant decision, and look contextually to identical underlying substantive requirements: the concomitant requirements of mental illness and dangerousness. They follow seriatim:

In *Pino* v. *Higgs*, 75 F.3d 1461 (10th Cir. 1966) the court determined that police officers "acted reasonably under the circumstances and in accordance with New Mexico's involuntary commitment statute," *id.* at 1468, that

> they had "reasonable grounds to believe that the person, as a result of mental illness, presents a serious likelihood of harm to [her]self or others and that immediate detention is necessary to prevent harm."

Id. (quoting statute).

In *Glass* v. *Mayas*, 984 F.2d 55 (2d Cir. 1993) the court said:

> [t]he Fourth Amendment requires that an involuntary hospitalization "may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard."

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[17] Probable cause is not some singularly fixed abstraction. It is a concept of many applications, and contextually fact-specific. Very recently, this Court spoke of "probable cause" (and "reasonable suspicion"):

> Articulating precisely what [they] mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent ment, not legal technicians, act. . . . We have cautioned that these two legal principles are not finely tuned standards. . . . They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."

Ornelas v. *United States*, *supra* 116 S.Ct. at 1661 (citations and internal quotes omitted).

Id. at 58 (quoting *Villanova* v. *Abrams*, 972 F.2d 792, 795 (7th Cir. 1992)). In *Villanova, supra*, the court stated that the governing legal standard was provided by the Illinois mental health code:

> a person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future. . . .

Id. at 794 (quoting code).

In *Gooden* v. *Howard County, Md.*, 954 F.2d 960 (4th Cir. 1992) the court stated that probable cause is to be judged "in the mental health seizure context." *Id.* at 968. And in both *Maag* v. *Wessler*, 960 F.2d 773 (9th Cir. 1991) and *Harris* v. *Pirch*, 677 F.2d 681 (8th Cir. 1982), the contexts speak of

> appears to be seriously mentally ill and . . . a danger to others or to himself"

Maag at 776 (quoting code), and

> reasonable cause to believe that such person is suffering from a mental disorder and presents a likelihood of serious physical harm to himself or others which is imminent. . . .

Harris at 684 (quoting code).

None of these statutory standards, nor the "reasonableness" applied, constitute any conflict with the Massachusetts statute as interpreted and applied by the First Circuit.

Finally, in a case that appears more supportive of the City than of the Petitioner, the court in *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971) recognized that a showing of probable

cause for involuntary commitment may be made on a physician's certifying document "alone," where, as in the instant case, there is "no dispute about the factual recitals and diagnoses therein." *Id.* at 1374.[18]

Accordingly, it does not appear that a substantial conflict, or indeed any conflict exists. Certainly, there is not "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" as to warrant certiorari review. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) *quoted in Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955).

IV. To the Extent That This Case Presents a Novel Issue, It Would Be An Appropriate Exercise of This Court's Discretion to Deny Certiorari Review In Order to Permit State and Federal Courts to Address the Issue.

McCabe says that this case presents an important and novel issue. (Pet. Cert. at 6-7).[19] While there may be debate as to how "novel" this case is in the realm of "special needs" searches, to the extent that it is novel[20] and important, as Justice Stevens has said:

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[18] The City relied on several of these same cases in its brief before the First Circuit. (City's Br. 1st Cir. at 19). And, the First Circuit "consult[ed] their reasoning for guidance" in this case. (A. A at 12a).

[19] Petitioner says that "[t]he issue presented in this case is at least as important as that in *Soldal* [v. *Cook*, 506 U.S. 56 (1992)]." (Pet. Cert. at 12). Thus, the Petitioner says, this court should grant certiorari review. The City declines to engage in debate, perhaps presumptuous, of the relative importance of cases that come before this Court on certiorari. The City respectfully views that these judgments of relative importance are exclusively for this Court in the exercise of certiorari discretion.

[20] The First Circuit allowed that the area is as yet "uncharted" as respects "searches" to effect involuntary commitments. (A. A at 12a).

> those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts.[21]
>
> Often, a denial of certiorari on a novel issue will permit the state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court."[22]

Payton itself appears to be a model of such postponement. This Court had repeatedly reserved the issue in *Payton*. *Payton* at 574-75. By the time this Court granted certiorari review in *Payton*, a large number of state and federal courts had addressed the issue. *Id.* at p.575, notes 1-4.

V. This Case Is Not Appropriate for Certiorari Review As the Judgment Is Supportable On An Alternative Ground.

This Court refuses to grant a writ of certiorari where there is an alternative ground for finding that the judgment below is correct.[23] There is such a ground here.

The City fully briefed and argued below the alternative ground that its policy was to execute pink papers pursuant to Mass. Gen. Laws Ann. ch. 123, §§ 1 & 12(a), and that § 12(a) specifically provides for issuance of pink papers in an "emergency." Thus, the City argued, its policy was within the estab-

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[21] *Lackey* v. *Texas*, ___ U.S. ___, 115 S.Ct. 1421 (1995) (Mem.) (Stevens, J., respecting denial of certiorari).

[22] *Id.* 115 S.Ct. at 1422, quoting *McCray* v. *New York*, 461 U.S. 961 (1983) (Mem.) (Stevens, J., with Blackmun, J. and Powell, J., joining).

[23] *See, e.g., Colorado* v. *Nunez*, 465 U.S. 324 (1984). The "precedents [of this Court] establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814, n.12 (1984).

lished "Law of Emergency." (City's Br. 1st Cir. at 18-23).[24] (A. A at 12a).

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), this Court specifically recognized an exception to the warrant requirement in emergency situations:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or an emergency."

Id. at 393 (quoting *Wayne* v. *United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)) (Berger, C.J.) (citations omitted).[25]

The First Circuit noted McCabe contended that "medical-psychiatric 'emergency' determinations do not equate with constitutionally cognizable "exigent circumstances. . . ." (A. A at 13a). The First Circuit decided that it need not decide

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[24] The City also argued that if the time of execution of the pink paper by the officers was "somehow beyond the pale of emergency, the execution would not be an act of the 'policy'. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978)." (City's Br. 1st Cir. at 17) (*See* A. A at 13a, n.8).

[25] Former Chief Justice Warren Berger also wrote in *Wayne*, *supra*:

> Neither the Constitution, statutes or judicial decisions have made the home inviolable in an absolute sense. Collectively they have surrounded the home with great protection but protection which is qualified by the needs of ordered liberty in a civilized society.
>
> Breaking into a home by force is not illegal if it is reasonable in the circumstances. . . .
>
> That such an entry would be an intrusion is undoubted but here we reach the balancing of interests and needs.

whether they do, deciding the case on the "special needs" ground.[26]

The City respectfully maintains that the "law of emergency" alternatively supports this judgment.

CONCLUSION

For all the above reasons, the writ of certiorari should be denied.

Respectfully submitted,

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[26] "[W]e need not enter the skirmish over the distinctions between 'emergencies' and 'exigent circumstances' [because] [t]he City policy, as evidenced by the actual conduct of its police officers, falls squarely within a recognized class of *systemic* 'special need' searches which are conducted without warrants in furtherance of important administrative purposes." (A. A at 13a) (emphasis in original).

(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

MARY McCABE, AS ADMINISTRATRIX
OF THE ESTATE OF RUCHLA "ROSE" ZINGER,
Petitioner,

v.

THE CITY OF LYNN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND RESPONSE TO BRIEF OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION, IN SUPPORT OF PETITION

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RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION, IN SUPPORT OF PETITION

In accordance with Supreme Court Rule 37.5, the City of Lynn ("City"), Respondent in this matter, having declined to give consent, objects to the motion of the *Amici Curiae* for leave to file an *Amicus Curiae* brief in support of Petitioner. In support hereof, the City files its Response to the Brief *Amicus Curiae*, attached hereto.

The City objects for the following reasons, as detailed in the City's attached Response:

1. Reason 1 of the *Amicus Curiae* brief, that the First Circuit departs from the "special needs" decisions of this Court, is violative of Supreme Court Rule 37.1, as it brings nothing to the attention of this Court not already brought to its attention by the parties.
2. *Amici*'s Claim in Reason II of their brief that the First Circuit erred in interpreting § 12(a) of Mass. Gen. Laws Ann. ch. 123 to authorize warrantless searches and seizures is improper for multiple reasons: (1) It presents an issue not disputed before this Court by the Petitioner; (2) It is not an issue fairly within the Question Presented; (3) Moreover, even if the State statute required a warrant in these circumstances, a search in the absence of a warrant would present an issue of state law, not a constitutional question within the federal Fourth Amendment context of this judgment. In any event, the First Circuit's interpretation of § 12 is sup-

ported by traditional rules of statutory construction, and the elementary maxim: "expressio unius est exclusio alterius." Thus, this argument of *Amici* brings nothing relevant to the attention of this Court and is violative of Supreme Court Rule 37.1

3. *Amici*'s claim in Reason II of their brief, that the First Circuit was incorrect in stating that a pink paper can be authorized only by a licensed psychiatric physician, at best only addresses dictum, not essential to this judgment, because there is no dispute that the pink paper in this case was issued by a licensed psychiatric physician. Thus, this argument of *Amici* brings nothing relevant to the attention of this Court, and is violative of Supreme Court Rule 37.1.
4. *Amici* claim in Reason II of their brief of purported inadequacies of medical professionals in issuing pink papers does not impugn the First Circuit's "special needs" analysis. To the extent that such examples suggest any weakness in individual professionals in dealing with the mentally ill, they appear irrelevant, as the determination of "reasonableness" in the context of special needs search procedures looks to "essential systemic attributes" and not to individual performers. The claimed deficiencies are well within the mechanisms of the State to address, as Massachusetts law demonstrates, and concepts of federalism and the reserved powers of the state dictate that such adjustments are not the role of the Fourth Amendment.

In summary, the *Amici* bring nothing to the attention of this Court not already presented by the parties, and their claims are

neither relevant to this litigation nor to the judgment. Accordingly, it is respectfully submitted that the motion of the *Amici* for leave to file their brief *Amicus Curiae*, be denied.

Respectfully submitted,

/s/_____

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The *Amici* seek to bring to this Court an *Amicus Curiae* brief offering two captioned Reasons for Granting the Writ. The City responds here to the points offered in those reasons.

ARGUMENT

I. Reason I of the *Amicus Curiae* Brief, That the First Circuit Departs From the "Special Needs" Decisions of This Court, Is Violative of Supreme Court Rule 37.1

The *Amici* say, as their first Reason for granting the writ, that the First Circuit "eviscerates the Fourth Amendment warrant requirement" (*Amicus* Br. at 2) through "a significant departure" from the special needs decisions of this Court. (*Id.* at 4). In offering this Reason, the *Amici* employ the same decisions, draw the same factual distinctions, and make the identical arguments made by the Petitioner in her Reason II for granting the writ. The Petitioner had argued under the caption, "The Decision Below Is An Unjustified Deviation From Consistent Precedent." (Pet. at 9, *see* 9-10). Only the phrasing differs.

The City has already responded to these arguments in its Brief in Opposition to the petition, detailing why this decision of the First Circuit is a proper application of the "special needs" exception to the warrant requirement of the Fourth Amendment. (City's Opp. Br. at 7-12).

Supreme Court Rule 37.1 provides:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

A careful reading of *Amici*'s Reason I discloses there is nothing therein that has not already been brought to the attention of this Court by the parties. Thus, as respects Reason I, *Amici*'s brief is violative of Supreme Court Rule 37.1. Reason I appears to be nothing more than a vote by the *Amici* that certiorari be granted.[1]

II. The Arguments of the *Amici* That the First Circuit Erred in Interpreting That § 12(a) of Mass. Gen. Laws Ann. ch. 123 Authorizes Warrantless Searches and Seizures; and In Stating That Only a Licensed Psychiatric Physician Can Authorize a Pink Paper, Are Without Merit for Several Reasons.

In Part A of Reason II, the *Amici* say that the First Circuit "misreads" the State statute in two particulars. First, the *Amici*

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[1] The *Amici* chide the First Circuit for reliance on *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), saying that the First Circuit "makes no attempt to explain how *Griffin* could apply in a civil commitment context where the determinative 'criminal sanction' is lacking." (*Amicus* Br. at 5). The *Amici*, as did the Petitioner, pull a circumstance from *Griffin* and read it myopically. (*See* City's Opp. Br. at 9-10).

Even if "criminal sanction" was a "determinative" factor in *Griffin*, it does not provide the doctrinal limit of the "special needs" exception in other applications. And contrary to the *Amici*'s criticism, the First Circuit repeatedly explains how and why the tenets of a "special needs" search, as applied in *Griffin*, are applicable to the circumstances of this case. *See, e.g.*:

i. *Griffin* recognizes that a " 'special need' . . . [could] be undermined systemically by an impracticable warrant or probable-cause requirement," *McCabe*, 77 F.3d at 545 (Pet. 10a);

ii. "[R]igid adherence to a warrant requirement reaches its most suspect extreme where a judicial officer lacks the innate expertise to assess the soundness of the basic ground upon which the warrant request is predicated," *id*. at 550 (Pet. 22a-23a);

iii. "[S]uperimposing . . . a judicial factfinding mechanism upon the evaluation made by the licensed psychiatric physician in the involuntary commitment context . . . in emergent circumstances [would, as in the *Griffin* context] 'interfere to an appreciable degree' " with the State's special need, *id*. at 551 (Pet. 26a) (quoting and analogizing to *Griffin*);

iv. "Unlike the characteristic relationship between law enforcement personnel and criminal suspects, a committing physician's relationship with a patient, or even a

say that the First Circuit erred in interpreting that § 12(a) of Mass. Gen. Laws Ann. ch. 123, "implicitly" authorizes warrantless searches and seizures. (*Amicus* Br. at 7). Second, the *Amici* say that the First Circuit was incorrect in stating that "a pink paper can be authorized *only by a licensed psychiatric physician.' . . .*" (*Amicus* Br. at 7, quoting First Circuit) (emphasis by *Amici*).

A. Amici's *Claim that the First Circuit Erred in Interpreting § 12(a) to Authorize Warrantless Searches and Seizures.*

Although the City details below that the First Circuit's conclusion that § 12(a) authorizes warrantless searches and seizures is fully consistent with elementary principles of statutory construction, it should be noted initially that the *Amici*'s argument that the First Circuit erred in this construction is improper for multiple reasons: (1) It presents an issue not disputed before this Court by the Petitioner. The Petitioner does not dispute the First Circuit's statutory construction, but maintains that a warrant was required under the Fourth Amendment.[2] (2) It is not an issue fairly within the Question Presented.[3] Whether or not the State statute authorizes a warrantless search and seizure is not relevant respecting the question presented: whether the First Circuit "creat[ed] a new and unprecedented exception to the . . . Fourth Amendment" warrant requirement. (Question Presented, Pet. at *i*). (3) Moreover, even if the State statute required a warrant in these circumstances, a search in the absence of a warrant would present an issue of state law, not

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nonpatient, is in no sense adversarial . . . [and is constrained by] ethical responsibilities," *id.* at 552 (Pet. 28a) (specifically recognizing *Griffin*'s concern respecting the degree of impartiality of the decision maker).

[2] *See* City's Opp. Br. at 4 and note 4.

[3] "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14(a).

a constitutional question within the federal Fourth Amendment context of this judgment. The issue for this Court is whether the Fourth Amendment requires a warrant.

In any event, the First Circuit was correct in its statutory construction. Contrary to the bold declaration by the *Amici* that "[t]he statute *expressly* contemplates that, in circumstances such as these, a judge should consider the evidence presented for involuntary commitment," the statute does no such thing. (*Amicus* Br. at 7) (emphasis added). *Amici* rely on the express provision for a warrant found in § 12(e). (*Amicus* Br. at 7, citing § 12(e)).[4] But, the express provision of a warrant requirement in § 12(e), contrasted by the absence of such language in § 12(a), argues against the *Amici*.

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[4] The *Amici* also rely on the district court's opinion that § 12(a), read without inferring a warrant requirement, would be violative of the Fourth Amendment. (*Amicus* Br. at 7). Thus, the district court provided a "saving constitutional interpretation [that] [a] warrant would be required whenever it is clear that a 'pink paper' will not be voluntarily complied with, that police officers will be involved, and force is threatened." *McCabe*, 875 F.Supp. at 62, n.11 (Pet. 35a). The City argued successfully before the First Circuit that the district court's "saving" construction:

> would virtually stop the Commonwealth's response to emergency commitments. The circumstances the district court imposes as requiring a warrant are the usual circumstances of emergency commitment. Indeed, in the context of emergency involuntary commitments the reasonable inference is that consent will not be forthcoming and force will be necessary, otherwise it would not be involuntary. Likewise, it is reasonable to infer that police will be involved in the usual case. In our society a properly constituted constabulary traditionally has been called upon in emergency.
>
> The district court's ruling is mechanical and unduly restrictive. The construct clearly places a substantial procedural impediment to timely emergency response, and is thus violative of the flexibility due the state. . . . The ruling offends federalism, invading the state's *parens patriae* and police powers of "preventing serious bodily harm by mentally disturbed individuals to themselves or others." It leaves the City of Lynn and its police with the conundrum of performing these important and pressing state functions and violating federal civil rights law for doing so. The foreseeable result is paralyzation of the state's reasonable emergency response mechanisms to dangerous mentally ill persons.

(City's Br. 1st Cir. at 23-24) (citations and footnotes omitted).

Section 12(e) provides a category of civil commitment which may be initiated by "*Any person*" upon application to a designated court. *Id.* (emphasis added). The City argued below that § 12 requires a warrant only when an application for a ten-day commitment is made under § 12(e), and not for emergency commitments under § 12(a). The City argued that it is clear, as a matter of statutory construction, that the Massachusetts Legislature did not intend the delay of a warrant procedure in § 12(a) hospitalizations. Having provided a warrant procedure in § 12(e), the Legislature certainly could have done so in § 12(a) had such a procedure been intended. The City argued that the legislative intent not to require a warrant in § 12(a) searches and seizures is reasonably premised on at least two important distinctions. First, unlike the application of lay persons under § 12(e), the physician employs objective professional judgment in the determinations of mental illness and the risk of serious harm. Second, because of "the emergency nature of the case" in the instance of a recalcitrant and dangerous mentally ill person, § 12(a), a warrant procedure is neither practical nor constitutionally required. (City's Br. 1st Cir. at 15).

The First Circuit adopted this interpretation, referring to the emergency commitment of a recalcitrant and dangerous mentally ill person as a "category 2" commitment procedure, and the lay procedure of § 12(e) as a "category 4" commitment. 77 F.3d at 547-48 (Pet. at 16a-17a).[5] The First Circuit correctly reasoned:

> As only the category 4 commitment procedure expressly incorporates a warrant requirement, we think it clear that the statute implicitly authorizes warrantless searches and seizures in the three remaining contexts.

[5] The First Circuit parsed the statute as providing four categories of civil commitment procedures. *Id.*

Id. at 548 (Pet. at 17a).[6]

The First Circuit's interpretation of § 12 is supported by traditional rules of statutory construction, and the elementary maxim: "expressio unius est exclusio alterius" recognized in both federal and state courts. *See* 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction*, §§ 47.23, 47.25, at 217, 234 (5th ed. 1992). *See, e.g.*:

> In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated.

United States v. *Azeem*, 946 F.2d 13, 17 (2d Cir. 1991);

> [T]he general principle or rule, frequently stated by this court, [is] that where, in a statute, an express limitation or proviso is made with reference to a given subject matter, and, in the same statute, no such limitation or proviso is made applicable to a related subject matter, the absence of the limitation or proviso in the second instance is a strong indication that it is not intended to apply, or, by implication, that it is excluded.

Opinion of the Justices, 309 Mass. 571, 605, 34 N.E.2d 527, 547 (1941) (Cox, J.).

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[6] The First Circuit specifically noted that as the pink paper was issued under category 2, "[t]he only question before us, therefore, concerns the constitutionality of the 'category 2' warrantless search procedure." *Id.*

B. Amici's *Claim that the First Circuit Was Incorrect In Stating That a Pink Paper Can Be Authorized Only By A Licensed Psychiatric Physician.*

The *Amici* correctly note that the First Circuit stated that "a pink paper can be authorized only by a licensed psychiatric physician. . . ." 77 F.3d at 551 (Pet. at 25a) (*Amicus* Br. at 7). It is true that the First Circuit did not include in the passage quoted by *Amici* the statutory references of § 12(a) to "psychologist" and "psychiatric nurse." But this is hardly of consequence because there is no dispute that in this case the pink paper was in fact issued by a licensed and qualified psychiatrist.[7] It is clear that the focus of the court, as it must have been, was on the facts and circumstances of the case before it, thus its repeated references to a "licensed" or "qualified" "physician." In parsing § 12(a) earlier in the opinion, and identifying the four categories of commitment, the First Circuit did include "psychologist" and "psychiatric nurse" in "category 2." *Id.* at 547 (Pet. at 16a). Thus, it appears that it was open to *Amici* to reference them. But again, this is of no consequence to this judgment. To the extent that the First Circuit's references to "category 2" searches and its "holding"[8] may be read as inclusive of pink papers issued by other than a qualified physician, it is dictum, not "essential to the determination of the case . . . and lack[ing] the force of an adjudication." *Black's Law Dictionary* (6th ed.) (Dictum).[9]

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[7] *See* pink paper in which Dr. Barden indicates he is both a "Licensed Physician" and "Qualified Physician." (Pet. at 66a).

[8] In its statement of "holding" the First Circuit does reference "category 2" pink papers. 77 F.3d at 554 (Pet. at 32(a)).

[9] "Dictum" in circuit court opinions presents "nothing reviewable by this Court." *Stickel* v. *United States*, 76 S.Ct. 1067, 1068 (1956) (Harlan, J. on denial of application for bail). "This Court 'reviews judgments, not statements in opinions.'" *Grandy* v. *Florida*, ___ U.S. ___, 114 S.Ct. 2647, 2653 (1994) (citations omitted); *Texas* v. *Hopwood*, ___ U.S. ___, 1996 WL 227009, No. 95-1773 (July 1, 1996) (Ginsburg, J., and Souter, J., on denial of certiorari).

In any event, there is no showing in this litigation respecting any systemic inadequacy of these medical professionals or that pink papers issued by such statutorily designated and qualified professionals would be so lacking in reliability as to not be within a reasonably designed and regulated system. (*See* Argument III below).

III. The Purported Inadequacies of Medical Professionals in Issuing Pink Papers Do Not Impugn the First Circuit's "Special Needs" Analysis.

In part B of Reason II, the *Amici* say that the First Circuit misunderstood the inadequacies of medical personnel in issuing pink papers. (*Amicus* Br. at 6). *Amici* offer "case" examples of these inadequacies — a "parade of horribles." To the extent that such examples suggest any weakness in individual professionals in dealing with the mentally ill, they appear irrelevant, as the determination of "reasonableness" in the context of special needs search procedures looks to "essential systemic attributes" and not to individual performers. 77 F.3d at 549 (Pet. at 21a).

The systemic attributes of the search procedure are apparent. Massachusetts law mandates that the Commonwealth's Department of Mental Health establish procedures for administration of the mentally ill, and the qualification, designation, and review of medical professional performance under § 12(a):

> The department shall . . . adopt regulations consistent with this chapter which establish procedures and the highest practical professional standards for the reception, examination, treatment, restraint, transfer and discharge of mentally ill persons in departmental facilities. Said regulations shall be adaptable to changing conditions and to advances in methods of care and treatment of the mentally ill.

Mass. Gen. Laws Ann. ch. 123, § 2. The Department of Mental Health has promulgated regulations pursuant to this statutory charge. 104 Code of Massachusetts Regulations ("CMR"), § 3. The First Circuit was entitled to rely on the integrity of the Massachusetts legislative scheme and a reasonable expectation of appropriate professional and ethical performance.[10] *Cf. United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the offical acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *United States* v. *Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 1486 (1996) (presumption of regularity applied to prosecutorial decisions).

While the individual departures from appropriate professional conduct proffered by the *Amici* are to be regretted, the Constitution does not, nor can it require perfection.[11] State mechanisms and remedies to adjust such lapses as a guard against inadequate performance, despite the protestations of the *Amici*, appear to be reasonably available.[12] They are available not only through the oversight of the Massachusetts Department

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[10] Of course, the "examples" proffered here by the *Amici* are purely hypothetical in the context of this litigation.

[11] *See, e.g., Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("the Constitution entitles a criminal defendant to a fair trial, not a perfect one"); *E & T Realty* v. *Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987) (the Constitution does not require perfect application); *Briggs* v. *Sullivan*, 954 F.2d 534, 540 (9th Cir. 1992) ("the Constitution only requires the government to take reasonable measures, not perfect ones").

[12] The First Circuit carefully considered that "judicial oversight might provide some preliminary insulation against obvious abuse;" but, in balance, determined the "statutory mechanism itself affords reasonable safeguards against such concerns." 77 F.3d at 551 (Pet. at 25a):

> We discern no sufficient justification for superimposing such a judicial fact finding mechanism upon the evaluation made by a licensed psychiatric physician in the involuntary commitment context, especially since it promises no corresponding systemic benefit to offset the systemic delays in executing pink papers in emergent circumstances.

Id. at 551 (Pet. at 26a).

of Mental Health, and its echelons, but through established civil law. *See Reida* v. *Cape Cod Hospital*, 36 Mass. App. Ct. 553, 634 N.E.2d 122 (1994) (demonstrating availability of state tort action). Indeed, *Amicus*, Mental Health Legal Advisors Committee, which was created and empowered by the Massachusetts Legislature to render advice and protect the interests of the mentally ill,[13] which it does vigorously in many quarters including the courts, is a component of the Commonwealth's oversight, and demonstrates the legislative commitment of the Commonwealth of Massachusetts to the welfare of the mentally ill and those who may be affected by them.

Without doubt, any system can be improved. But our system of federalism not only permits, but relies on the several states to work such advances.[14] The Constitution of the United States is not an instrument to perform fine tuning.[15] With due respect, it may be that the energies and resources of the Mental Health Legal Advisors Committee would be spent more appropriately in seeking at the state level advancement on the deficiencies that they perceive.

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[13] Mass. Gen. Laws Ann. ch. 221, § 34E.

[14] Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experience and activities of all the rest." *Equal Employment Opportunity Commission* v. *Wyoming*, 460 U.S. 226, 265 (1982) (Burger, C.J., Powell, J., Rehnquist, J., O'Connor, J., dissenting, speaking of the reserved powers of the state and Justice Brandeis' concept of federalism in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932)).

[15] *Cf. Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 626 (D.C. Cir. 1983) (Scalia, J., MacKinnon, J., Bork, J., dissenting) ("[I]t is not the function of the Constitution to make such fine judgments; nor is it within the practical power of the courts to apply them. There is a gap between what the Constitution requires and what perfect governance might sometimes suggest. . . .").

CONCLUSION

For all the above reasons, and those stated in the City's Brief in Opposition to the petition, the writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

MARY McCABE, as Administratrix of the Estate of Ruchla "Rose" Zinger,

Petitioner,

vs.

THE CITY OF LYNN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Constitutional Protection from Warrantless Home Entry is not Limited to Criminal Proceedings; The Undisputed Evidence Shows No Emergency Justifying Forcible Warrantless Entry.

The longstanding precedents of this Court mandate that, in the absence of exigent circumstances, a warrant be obtained prior to the forcible entry of a home by government agents.[1] The City in its Brief in Opposition to Petition for Writ of Certiorari has disregarded the unique protection afforded the home under the Constitution, and has based its opposition exclusively upon precedents involving warrantless searches far less intrusive than the forcible entry of the home. The need for granting certiorari is compelling because this case squarely presents the issue of whether this Court will preserve the firm line drawn in *Payton v. New York*, 445 U.S. 573 (1980), by requiring a warrant as a condition to non-exigent entry of a home in civil commitment proceedings.

The City implicitly acknowledges that the decision of the First Circuit is in direct contravention of *Payton*, which unequivocally holds that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances that threshold may not be reasonably crossed without a warrant." *Id.* at 590. The City's

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[1] The sole exception to the requirement of obtaining a warrant prior to forced entry of a home is found in *Griffin v. Wisconsin*, 483 U.S. 868 (1987) wherein this Court upheld the validity of a warrantless search of a home conducted pursuant to State regulations specifically authorizing probation officers to search the homes of criminal probationers without first securing a warrant.

first line of response to this clear language, though couched as a criticism of Petitioner's arguments based on *Payton*, is in effect a criticism of this Court's holding in *Payton* as a "mechanical application[] of the Fourth Amendment." (Respondent's Brief at 11.)

In addition, the City contends that *Payton* and *Camara v. Municipal Court*, 387 U.S. 523 (1967), which both mandate a warrant as a prerequisite to valid entry of a residence under the Fourth Amendment, should be limited exclusively to searches occurring in a criminal context. (Respondent's Brief at 11-12.) In *Camara* the Court expressly rejected the argument advanced by the City here: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530. The notion that the protection of the Fourth Amendment is somehow limited in a civil context was recently unanimously rejected by this Court in *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992). "[T]he right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." *Id.* at 69. Further, this Court has previously applied the warrant requirement to invalidate warrantless entry to private property in a variety of non-criminal contexts.[2]

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[2] See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (illegal warrantless entry to effectuate arrest of a civil offender); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (illegal warrantless entry to investigate compliance with OSHA regulations); *G.M.*

Finally, the City has attempted to characterize the factual situation at issue as an "emergency" equivalent to exigent circumstances as a basis for warrantless entry within the reasoning of *Mincey v. Arizona*, 437 U.S. 385 (1978). (Respondent's Brief at 20-21.) This argument simply ignores the undisputed evidence, as found by both the District Court and the First Circuit, that the police officers here acted at their leisure, pursuant to a City policy which permitted forced entry to homes in the absence of exigent circumstances. See, e.g., the District Court's opinion at A-55a:

> Based upon Constable Jackson's prior attempts to serve the eviction process the officers had no indication that waiting a few hours would present an immediate threat to either Ms. Zinger or the community. Moreover, since the officers already had information that Ms. Zinger would not let them into her home, they could have presented that information and the involuntary commitment order to a magistrate *prior* to their attempt to serve the order at 1:00 p.m. Instead, the officers (following City policy) chose to break into Zinger's home to serve the civil commitment order. Therefore, no emergency situation existed which would justify the officers' entry into Ms. Zinger's home without a warrant.

In its opinion the First Circuit expressly acknowledged the inapplicability of exigent circumstances or emergency as a basis for the warrantless search, by referring to "the

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Leasing Corp. v. United States, 429 U.S. 338 (1976) (illegal warrantless entry of a business premises by IRS agent to execute a civil levy order).

undisputed evidence that the police officers waited several hours before executing the pink paper, thus demonstrating little concern that Ms. Zinger might exhibit the sort of sudden onset of 'dangerousness' alluded to in the assessment made by Dr. Barden." (First Circuit's opinion at A-20-21a.) Because of this undisputed evidence, the First Circuit rejected reliance on a theory of "emergency" or exigent circumstances as a basis for justifying the warrantless entry to Mrs. Zinger's home. That same undisputed evidence warrants that this Court reject the City's attempt to resurrect the "emergency" theory as a basis for denying certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: September 18, 1996

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